No. 94-1140-CFX
Status: GRANTED

Docketed:
December 27, 1994

Title: 44 Liquormart, Inc. and Peoples Super Liquor Stores, Inc., Petitioners
v.
Rhode Island and Rhode Island Liquor Stores Association

Court: United States Court of Appeals for the First Circuit

Counsel for petitioner: Lawson,Evan T.

Counsel for respondent: Partington,Rebecca Tedford, Jones,Lauren E.

102494-Op. of 070894 withdrawn & judgmt vac.
101594 ext til 122694 (HOL) by Souter, J.-NOT CITED

Entry	Date	Note	Proceedings and Orders
1	Oct 14 1994	G	Application (A94-263) to extend the time to file a petition for a writ of certiorari from October 27, 1994 to December 26, 1994, submitted to Justice Souter.
2	Oct 15 1994		Application (A94-263) granted by Justice Souter extending the time to file until December 26, 1994.
3	Dec 27 1994	G	Petition for writ of certiorari filed.
5	Jan 12 1995		Order extending time to file response to petition until February 25, 1995.
6	Feb 1 1995		Brief amicus curiae of Association of National Advertisers, Inc. filed.
7	Feb 23 1995		Brief of respondent Rhode Island in opposition filed.
8	Feb 23 1995		Brief of respondent Rhode Island Liquor Stores Association in opposition filed.
9	Mar 1 1995		DISTRIBUTED. March 17, 1995 (Page 14)
10	Mar 29 1995		REDISTRIBUTED. April 14, 1995 (Page 12)
12	Apr 17 1995		REDISTRIBUTED. April 21, 1995 (Page 16)
14	Apr 24 1995		REDISTRIBUTED. April 28, 1995 (Page 12)
15	May 1 1995		Petition GRANTED. limited to the following question: "Whether Rhode Island may, consistent with the First Amendment, prohibit truthful, non-misleading price advertising regarding alcoholic beverages?" **********
17	May 26 1995		Order extending time to file brief of petitioner on the merits until July 6, 1995.
18	Jun 26 1995		Brief amicus curiae of Institute for Justice filed.
19	Jun 30 1995		Joint appendix filed.
22	Jul 3 1995		Brief amici curiae of American Civil Liberties Union, et al. filed.
20	Jul 5 1995		Brief amici curiae of Association of National Advertisers, Inc., et al. filed.
21	Jul 6 1995		Brief amici curiae of Beer Insitute, et al. filed.
23	Jul 6 1995		Brief amici curiae of Newspaper Association of America, et al. filed.
24	Jul 6 1995		Brief amici curiae of Washington Legal Foundation, et al. filed.
25	Jul 6 1995		Brief of petitioners 44 Liquormart, et al. filed.

2pp

Entry	Date	Note	Proceedings and Orders
26	Jul 6 1995		Brief amici curiae of American Advertising Federation, et al. filed.
28	Jul 20 1995		Order extending time to file brief of respondent on the merits until August 21, 1995.
29	Jul 24 1995	D	Motion of respondent Rhode Island Liquor Stores Association for divided argument filed.
30	Aug 2 1995		Record filed.
		*	Partial record proceedings United States Court of Appeals for the First Circuit.
31	Aug 9 1995		Record filed.
		*	Original record proceedings United States District Court for the District of Rhode Island.
32	Aug 21 1995		Brief amici curiae of Council of State Governments, et al. filed.
33	Aug 21 1995		Brief of respondent Rhode Island filed.
34	Aug 21 1995		Brief of respondent Rhode Island Liquor Stores Association filed.
35	Aug 21 1995		Brief amicus curiae of Malt Beverage Distributors Association filed.
36	Sep 5 1995		SET FOR ARGUMENT WEDNESDAY, NOVEMBER 1, 1995. (1ST CASE)
37	Sep 8 1995		CIRCULATED.
38	Sep 13 1995		Motion of respondent Rhode Island Liquor Stores Association for divided argument DENIED.
39	Sep 25 1995	X	Reply brief of petitioners filed.
40	Nov 1 1995		ARGUED.

Supreme Court, U.S.
FILED

941140 DEC 27 1994

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No. ____

In The

Supreme Court of the United States

October Term, 1994

44 LIQUORMART, INC. and PEOPLES SUPER LIQUOR STORES, INC.,

Petitioners,

v.

STATE OF RHODE ISLAND, and RHODE ISLAND LIQUOR STORES ASSOCIATION,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Twenty-first Amendment weaken the protection the First Amendment affords truthful, non-misleading price advertising by relieving the state of the burden to prove that its restriction on speech "directly and materially advances a substantial state interest in a manner no more extensive than necessary to serve that interest?"

2. May the burden of proving the invalidity of a restriction on commercial speech be shifted to the party challenging the restriction by according presumptive validity to the state's unproved hypothesis?

TABLE OF CONTENTS

Page

Questions Presented i

Table of Authorities iv

Opinions Below 1

Basis For Jurisdiction 1

Statutes Involved 2

Statement of the Case 2

Summary Of Reasons For Granting The Writ 2

Procedural History 3

Facts 5

Reasons For Granting The Writ 7

A. *The Twenty-first Amendment Does Not Give An Added Presumption Of Validity To A Ban On Advertising The Price At Which A Retailer Sells Alcoholic Beverages* 7

B. *The Court Of Appeals Improperly Reversed The Allocation Of The Burden Of Proof Mandated By This Court* 15

C. *Rhode Island's Ban On Advertising The Price At Which Retailers Sell Alcoholic Beverages Does Not Directly Advance Its Interest In Promoting Temperance To A Material Degree Thereby Failing The Third Part Of The Central Hudson Test* 17

TABLE OF CONTENTS – Continued

Page

D. *Rhode Island's Ban On Advertising The Price At Which Retailers Sell Alcoholic Beverages Is More Extensive Than Necessary To Serve The State Interest In Promoting Temperance* 25

E. *The Court Of Appeals Conflicted With The Decisions Of This Court In Ruling That Rhode Island May Ban Advertisement By Out Of State Retailers Of Alcoholic Beverages* 27

Conclusion 29

TABLE OF AUTHORITIES

Page

CASES

324 Liquor Corp. v. Duffy, 479 U.S. 335 (1987).....12, 22

44 Liquor Mart, Inc. v. Racine, 829 F. Supp. 543 (D.R.I. 1993)..... *passim*

44 Liquormart, Inc. v. State of R.I., ___ F.3d ___ (1st Cir. 1994) 1

Anderson v. City of Bessemer City, 470 U.S. 564 (1985) 16, 24

Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984)..12, 29

Bigelow v. Virginia, 421 U.S. 809 (1975) 28

Board of Trustees of State Univ. of New York v. Fox, 492 U.S. 469 (1989) 21, 25

Brown-Forman Distillers Corporation v. New York State Liquor Authority, 476 U.S. 573 (1986).....12, 27

California Retail Liquor Dealer's Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980)..... 12

California v. LaRue, 409 U.S. 109 (1972) ..... *passim*

Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984) 9, 12, 13, 19

Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557 (1980)... *passim*

City of Cincinnati v. Discovery Network, Inc., ___ U.S. ___, 113 S. Ct. 1505 (1993) 20, 26

City of Newport, Kentucky v. Iacobucci, 479 U.S. 92 (1986) 11

Craig v. Boren, 429 U.S. 190 (1976) 11, 12

TABLE OF AUTHORITIES – Continued

Page

Dep't of Revenue v. James B. Beam Distilling Co., 377 U.S. 341 (1964) 12

Doran v. Salem Inn, Inc., 422 U.S. 922 (1975)..... 14

Dunagin v. City of Oxford, Mississippi, 718 F.2d 738 (5th Cir. 1983)..... 2, 8, 10

Edenfield v. Fane, ___ U.S. ___, 113 S. Ct. 1792 (1993) 16, 18, 20

Healy v. The Beer Institute, 491 U.S. 324 (1989)....13, 27

Ibanez v. Florida Dept. of Business and Professional Regulation, ___ U.S. ___, 114 S. Ct. 2084 (1994) 2, 16, 18, 19

Irons v. Federal Bureau of Investigation, 811 F.2d 681 (1st Cir. 1987) 16

Lamar Outdoor Advertising v. Mississippi State Tax Commission, 701 F.2d 314 (5th Cir. 1983)..... 8

Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982) 13

Lee v. Weisman, ___ U.S. ___, 112 S. Ct. 2649 (1992) 13

Michigan Beer & Wine Wholesalers Association v. Attorney General, 142 Mich. App. 294, 370 N.W.2d 328 (Mich. Ct. App. 1985), *cert. den.*, 479 U.S. 939 (1986) 8, 22

New York State Liquor Authority v. Bellanca, 452 U.S. 714 (1981)..... 8, 14

Oklahoma Telecasters Association v. Crisp, 699 F.2d 490 (10th Cir. 1983)..... 9, 10

Pennsylvania State Police v. Hospitality Investments of Philadelphia, Inc., ___ A.2d ___, No. 77 E.D. 1992, 1994 WL 606543 (Pa. November 3, 1994) 9

TABLE OF AUTHORITIES – Continued

Page

Queensgate Investment Co. v. Liquor Control Commission, 459 U.S. 807 (1982) 9

Rhode Island Liquor Stores Association v. Evening Call Pub. Co., 497 A.2d 331 (1985) 29

Rice v. Alcoholic Beverage Control Appeals Bd., 21 Cal. 3d 431 (1978) 22

S & S Liquor Mart, Inc. v. Pastore, 497 A.2d 729 (1985) 18, 22

Seagram & Sons v. Hostetter, 16 N.Y.2d 47 (1965) 22

South Dakota v. Dole, 483 U.S. 203 (1987) 12

STATUTES AND RULES

28 U.S.C. §1254 1

28 U.S.C. §1331 3

42 U.S.C. §1983 3

Regulation 32 of the Rhode Island Liquor Control Administration 6

Rhode Island General Laws §3-8-7 ..... 2, 3, 5

Rhode Island General Laws §3-8-8.1 ..... 2, 3, 5, 29

MISCELLANEOUS

Bentsen v. Coors Brewing Company, No. 93-1631, Petitioner's Brief 10

Bentsen v. Coors Brewing Company, No. 93-1631, Transcript of Oral Argument, November 30, 1994 27

TABLE OF AUTHORITIES – Continued

Page

M. J. Waterson, ADVERTISING BRANDS AND MARKETS, (Advertising Ass'n Monograph, 2nd ed. 1985)..... 24

New York State Moreland Commission on the Alcoholic Beverage Control Law, *Report and Recommendations No. 3*, January 21, 1964..... 21

No. _____

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

1. *44 Liquor Mart, Inc. v. Racine*, 829 F. Supp. 543 (D.R.I. 1993).

2. *44 Liquormart, Inc. v. State of R.I.*, ___ F.3d ___ (1st Cir. 1994).

BASIS FOR JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit was entered on October 24, 1994. Jurisdiction is conferred by 28 U.S.C. §1254.

STATUTES INVOLVED

Rhode Island General Laws §§3-8-7 and 3-8-8.1 and Regulation 32 of the Rhode Island Liquor Control Administration.[1]

STATEMENT OF THE CASE

Summary Of Reasons For Granting The Writ

The petitioners, 44 Liquormart, Inc., a Rhode Island liquor store operator (44 Liquormart), and Peoples Super Liquors, Inc., a Massachusetts liquor store operator (Peoples) request that the Court issue a *Writ of Certiorari* to correct the decision of the United States Court of Appeals for the First Circuit, and resolve a conflict between the First and Fifth Circuits, on the question of whether the Twenty-first Amendment gives an added presumption of validity to a state's ban on advertising the price at which a retailer sells alcoholic beverages. The Court of Appeals effectively held that the Twenty-first Amendment overcame the First Amendment's protection for commercial speech by eliminating the government's burden to prove that "the restriction directly and materially advances a substantial state interest in a manner no more extensive than necessary to serve that interest." *Ibanez v. Florida Dept. of Business and Professional Regulation*, ___ U.S. ___, 114 S. Ct. 2084, 2088 (1994). That decision was contrary to the decisions of this Court and in conflict with that of a majority of the judges of the Fifth Circuit in *Dunagin v. City of Oxford Mississippi*, 718 F.2d 738, 746 (5th Cir. 1983).

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[1] The text of the statutes and regulation is set forth in the Statutory Addendum.

There is also a split on the point in state court decisions.[2] In addition, the Court of Appeals erroneously held that the restriction on speech was valid, despite findings by the District Court that the restriction did not materially advance the state's interest, and was more burdensome than necessary when the state's interest could be fully served without restricting speech at all.

Procedural History

This is an action by 44 Liquormart and Peoples originally brought against the Rhode Island Liquor Control Administrator (the Liquor Control Administrator), for a determination that R.I.G.L. §§3-8-7 and 3-8-8.1 and Regulation 32 of the Rhode Island Liquor Control Administration, which ban advertising the price of alcoholic beverages within the State of Rhode Island, deny the petitioners their constitutional right to freedom of speech and deny the citizens of Rhode Island their constitutional right to obtain accurate price information about lawful products. Jurisdiction in the United States District Court is based upon 28 U.S.C. §1331 (federal question) and 42 U.S.C. §1983 (deprivation of federal constitutional rights under color of state law). The Rhode Island Liquor Stores Association (RILSA) was permitted to intervene over the plaintiffs' objection to protect its members' interest in restricting competition.[3] Later the State of Rhode Island was substituted as the party defendant.

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[2] *See* pages 8-9, below.

[3] In its memorandum in support of its motion to intervene, at page 2, the Rhode Island Liquor Stores Association stated its interest: "[t]he overwhelming majority of the Class A Retailers in the State of Rhode Island operate at a marginal profit. The elimination of the prohibition on advertising of liquor sales

After trial on the merits, including taking testimony of expert witnesses for both sides, the District Court in a well-reasoned opinion applied the standard set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980) to the facts found, and entered a judgment that the price advertising ban was unconstitutional. *44 Liquor Mart, Inc. v. Racine*, 829 F. Supp. 543 (D.R.I. 1993). The State and RILSA appealed to the United States Court of Appeals for the First Circuit.

On May 2, 1994, the Court of Appeals affirmed the District Court's ruling as to out of state retailers, but reversed as to Rhode Island retailers. Both sides filed petitions for rehearing with suggestions for rehearing *en banc*. On July 22, 1994, the panel ordered the May 2 opinion withdrawn and issued a "not for publication" amended opinion that reached the same result as the earlier opinion. The court "ordered that either party may file a petition for rehearing with a suggestion for rehearing en banc by July 22, 1994." Both sides did so. On July 29, 1994, the Court of Appeals denied 44 Liquormart's petition for rehearing, but took no action on those of Rhode Island and RILSA. 44 Liquormart obtained an order from this Court extending the time for filing its petition for a writ of *certiorari* to and including December 26, 1994. On October 24, 1994, the Court of Appeals entered a judgment reversing the decision of the District Court in its entirety.

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would, of necessity, add an additional financial burden to each of the Class A Retailers who would be obliged to participate in the advertising arena and would be at a definite disadvantage when matched up against retailers who hold multiple licenses".

Facts

44 Liquormart operates a retail store for the sale of alcoholic beverages for consumption off the premises in Johnston, Rhode Island. Peoples operates retail stores for the sale of alcoholic beverages for consumption off the premises in New Bedford and Fairhaven, Massachusetts. The Liquor Control Administrator is charged with enforcing Rhode Island's laws and regulations governing the sale of alcoholic beverages. *44 Liquormart, Inc. v. Racine, supra,* (App. 20).

Rhode Island permits all advertising relating to alcoholic beverages, except that it forbids any reference to price outside licensed retail premises and prohibits Rhode Island communications media from accepting any advertisements that contain any reference to price in other states as well as Rhode Island. *Ibid.*

The Liquor Control Administrator vigorously enforces the price advertising ban. The ban on price advertising has been interpreted to go beyond stating the price at which a product is offered for sale. The Liquor Control Administrator has found that the price advertising ban prohibits use of the word "sale" in alcoholic beverages advertisements and that use of the word "wow" when juxtaposed with a reference to a particular item of alcoholic beverages in an advertisement also violates the statute and regulation. On December 17, 1991, the Liquor Control Administrator found 44 Liquormart in violation of R.I.G.L. §§3-8-7 and 3-8-8.1 and Regulation 32. She imposed a fine for publishing advertisements containing the words "wow" and "sale" in a newspaper even though the advertisements did not state the price at

which any product was offered for sale.[4] Other liquor licensees, as well as newspapers within Rhode Island, have been warned and fined for violation of the price advertising ban. *Ibid.*

Peoples, a Massachusetts retailer, has made extensive use of price advertising in Massachusetts where it is permitted. Peoples has attempted to place its advertisements, which include price information, in Rhode Island communications media, but has been refused because of the Rhode Island statute. Rhode Island communications media reach both Rhode Island and Massachusetts citizens. *Ibid.*

Both 44 Liquormart and Peoples desire to advertise the prices at which they offer alcoholic beverages for sale in Rhode Island communications media. Their proposed price advertising does not concern an illegal activity and presumably would not be false or misleading. *Ibid.*

Rhode Island justifies its ban on price advertising solely as promoting temperance, which it equates with reducing the consumption of alcoholic beverages. *Ibid.* There are no scientific studies that show banning price advertising has any direct effect upon consumption. *44 Liquormart, Inc. v. Racine, supra* (App. 22). In 1985 the Federal Trade Commission found that there is no reliable basis on which to conclude that alcohol advertising significantly affects alcohol abuse and that there is no basis for concluding that banning or otherwise limiting advertising would offer significant protection to the public. *Ibid.*

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[4] Since newspaper advertisements would not seem to constitute a "placard or sign" as used in Regulation 32, it is difficult to understand the basis for finding a violation of the Regulation.

Per capita consumption is affected by factors such as religion, ethnic background, family makeup and peer pressure that are more important in determining the amount of alcohol consumed than the presence or absence of price advertising. Indeed, per capita consumption in Rhode Island is higher than in some states that permit price advertising. According to the latest statistics, Rhode Island ranked in the upper 30 percent of the states in total per capita consumption. *Ibid.*

The state's expert attempted to justify the ban on price advertising with the theory that it would maintain higher prices by preventing price wars among Rhode Island retailers and increase the "search cost" that Rhode Island consumers would be subject to in attempting to find lower priced retailers. However, the District Court found that the state's theory had not been proved because Rhode Island's off-premises price advertising ban has had no significant impact on levels of alcohol consumption in Rhode Island. *44 Liquormart, Inc. v. Racine, supra,* (App. 31).

REASONS FOR GRANTING THE WRIT

A. The Twenty-first Amendment Does Not Give An Added Presumption Of Validity To A Ban On Advertising The Price At Which A Retailer Sells Alcoholic Beverages.

The Court of Appeals thought it "precisely in order" to give Rhode Island's restriction on speech an "added presumption of validity" because of the use of that phrase in *California v. LaRue*, 409 U.S. 109, 118-119 (1972) (App. 8). The effect of the added presumption was to eliminate the state's burden to prove the validity of the price advertising ban under *Central Hudson* and to put the

burden of proving invalidity on the petitioners. That attenuation of the First Amendment is contrary to the decisions of this Court and in conflict with the decision of the Fifth Circuit when it considered the issue.

In *Lamar Outdoor Advertising v. Mississippi State Tax Commission,* 701 F.2d 314 (5th Cir. 1983), a panel of the Fifth Circuit upheld a decision of the District Court finding a ban on alcoholic beverages advertising unconstitutional. The panel considered and rejected the state's argument that the Twenty-first Amendment, as applied in *LaRue,* made it "not an ordinary commercial speech case." 701 F.2d at 325-330. Hearing the matter *en banc,* the Fifth Circuit divided eight to five in finding the law constitutional, but said "[w]e base our decision, ultimately, upon the application of the Supreme Court's analysis in" *Central Hudson. Dunagin v. City of Oxford Mississippi,* 718 F.2d 738, 746 (5th Cir. 1983). Two members of the majority joined in a concurring opinion to emphasize their view that "[a] conclusion that the Twenty-first Amendment justifies greater intrusions upon the constitutional liberties of individual citizens than would otherwise be the case is an *insidious doctrine.* . . . " 718 F.2d at 754 [emphasis added]. Thus, seven of the 13 judges concurred in rejecting giving *any* weight to the Twenty-first Amendment, or the *dictum* in *La Rue.*

The state courts are also divided on the question. In *Michigan Beer & Wine Wholesalers Association v. Attorney General,* 142 Mich. App. 294, 370 N.W.2d 328 at 336 (Mich. Ct. App. 1985), *cert. den.,* 479 U.S. 939 (1986), the court considered the effect of *LaRue* and *New York State Liquor Authority v. Bellanca,* 452 U.S. 714 (1981), and concluded that "the Twenty-first Amendment does not require us to deal with restraints on freedom of speech any differently than we would if alcoholic beverages were not involved"

in striking down a restriction on price advertising for alcoholic beverages. 370 N.W.2d at 335. But the Pennsylvania Supreme Court (over vigorous dissent) recently held that its price advertising ban was supported by the added "presumption of validity" afforded by the Amendment. *Pennsylvania State Police v. Hospitality Investments of Philadelphia, Inc.*, ___ A.2d ___, No. 77 E.D. 1992, 1994 WL 606543 (Pa. November 3. 1994)

Oklahoma Telecasters Association v. Crisp, 699 F.2d 490 (10th Cir. 1983), which was relied upon by the state and the Court of Appeals, applied the *Central Hudson* analysis to an Oklahoma ban on alcoholic beverages advertising. However, its analysis may have been skewed by its conclusion that the Twenty-first Amendment permitted "regulation of commercial speech that might not otherwise be permissible." 699 F.2d 502.[5]

In *Queensgate Investment Co. v. Liquor Control Commission*, 459 U.S. 807 (1982), the Court dismissed, "for want of a substantial federal question," an appeal from a decision of the Ohio Supreme Court upholding a partial ban on price advertising for alcoholic beverages. While the Ohio court did not rely on *LaRue*, it did rely on the Twenty-first Amendment to fortify the substantiality of Ohio's interest in discouraging "excessive consumption of alcoholic beverages." *Queensgate Investment Co. v.*

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[5] The Tenth Circuit upheld the ban. This Court granted *certiorari* to consider the petitioner's claim that the ban was not a valid restriction on commercial speech, but ultimately decided the case on a ground raised by the Federal Communications Commission *amicus curiae*, holding that the Oklahoma ban on the retransmission of liquor advertisements in out-of-state signals by cable operators was preempted by federal regulation of cable broadcasting. *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 697 (1984).

Liquor Control Commission, 433 N.E. 2d 138, 141-142 (Oh. 1982). While recognition that the Twenty-first Amendment assists a state in establishing substantially its interest under the second part of the *Central Hudson* test is arguably appropriate, using the Amendment to modify or shift the burden of proof under the third and fourth parts of the test is not. In any event, most courts, including the Court of Appeals below, have not relied upon *Queensgate* as blanket authority for a price advertising ban, but have conducted an independent evaluation under *Central Hudson*. *Dunagin v. City of Oxford, Mississippi, supra*, 718 F.2d at 746. In *Oklahoma Telecasters Association v. Crisp, supra*, at 497-498 the court conducted an independent evaluation, but also was of the opinion that *Queensgate* "manifestly presented an issue concerning the *tension between the First and Twenty-first Amendments.*" 699 F.2d at 497 [emphasis added]. Rhode Island urged below that *Queensgate* was dispositive. The Court of Appeals, acknowledged *Queensgate* and speculated as to its applicability without resolving the question. (App. 9). The apparent ambiguity or the effect to be given to this Court's dismissal of the appeal in *Queengate* could be helpfully addressed by the Court in this case.

Suggesting that the Twenty-first Amendment authorizes curtailment of First Amendment protection for those who lawfully deal in alcoholic beverages is both persistent and pernicious. In *Bentsen v. Coors Brewing Company*, presently pending in this Court, the United States argued that its "labeling restriction" was "entitled to an added presumption of validity" because of the Twenty-first Amendment. No. 93-1631, Petitioner's Brief, 41.

Justice Stevens' apprehension that *LaRue* would become authority for the proposition that "the Twenty-first Amendment repealed not only the Eighteenth Amendment, but some undefined portion of the First Amendment as well,"

City of Newport, Kentucky v. Iacobucci, 479 U.S. 92, 103 (1986) [dissenting opinion], has been manifested. There is a conflict on this point between the First Circuit and the Fifth Circuit's, with the Tenth Circuit taking a middle road, but leaning toward the First Circuit's view, and the state courts are similarly divided, demonstrating the need for a resolution by this Court.

The Court of Appeals below and the recent decision of the Pennsylvania Supreme Court have read far too much into *LaRue* at the cost of the First Amendment. The Twenty-first Amendment was intended to create an exception to the normal operation of the Commerce Clause by permitting states to impose burdens on interstate commerce that otherwise would be invalid. "Neither the text nor the history of the Twenty-first Amendment suggests that it qualifies individual rights protected by the Bill of Rights and the Fourteenth Amendment where the sale or use of liquor is concerned." *Craig v. Boren*, 429 U.S. 190, 205-206 (1976).

> The States enjoy broad power under §2 of the Twenty-first Amendment to regulate the importation and use of intoxicating liquor within their borders. . . . At the same time, our prior cases have made clear that the Amendment does not license the States to ignore their obligations under other provisions of the Constitution. . . . Indeed, "[t]his Court's decisions . . . have confirmed that the Amendment primarily created an exception to the normal operation of the Commerce Clause." . . . Thus, as the Court explained in *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 84 S. Ct. 1293, 12 L.Ed.2d 350 (1964), §2 reserves to the States power to impose burdens on interstate commerce in intoxicating liquor that, absent the

> Amendment, would clearly be invalid under the Commerce Clause. *Capital Cities Cable, Inc. v. Crisp, supra,* 467 U.S. at 712 [citations omitted].

The Court has consistently rejected states' attempts to rely upon the Twenty-first Amendment as a justification for abrogating other constitutional provisions. *See Dept. of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341 (1964) [states may not tax alcoholic beverages in violation of the Import-Export Clause]; *Wisconsin v. Constantineau*, 400 U.S. 433, 436 (1971) [a statute that required the posting of names of excessive drinkers in retail liquor outlets violated due process]; *Craig v. Boren, supra* [a statute that prohibited the sale of beer to men under twenty-one and women under eighteen violated equal protection]; *South Dakota v. Dole*, 483 U.S. 203 (1987) [federal statute conditioning receipt of highway funds on adoption of minimum drinking age is a valid exercise of Congress' spending power].

Significantly, the Court has found many circumstances under which the Twenty-first Amendment does not even supplant the Commerce Clause. *California Retail Liquor Dealer's Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) [the states' power to regulate alcoholic beverages traffic is subject to federal anti-trust laws]; *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984) ["economic protectionism" of local alcoholic beverages violates the Commerce Clause]; *Brown-Forman Distillers Corporation v. New York State Liquor Authority*, 476 U.S. 573 (1986) [state regulation of alcoholic beverages prices is invalid under the Commerce Clause when it affects prices in other states]; *324 Liquor Corp. v. Duffy*, 479 U.S. 335 (1987) [a mandatory 112 percent minimum markup on alcoholic beverages based on the wholesale price violates antitrust

laws]; *Healy v. The Beer Institute*, 491 U.S. 324 (1989) [state regulation of alcoholic beverages prices is invalid under the Commerce Clause when it affects prices in other states]. In *Capital Cities Cable, Inc. v. Crisp, supra*, the Court held that a state's ban on alcoholic beverages advertising was preempted under the Commerce Clause by a federal regulation, without any discussion of whether the Twenty-first Amendment might provide an added presumption of validity.

Finally, in *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982), the Court decided that the First Amendment Establishment Clause prevented a state from giving churches a veto over the issuance of liquor licenses within 500 feet of them. No added presumption of constitutionality was accorded the state because of the Twenty-first Amendment. "The State may not exercise its power under the 21st Amendment in a way which impinges upon the Establishment Clause of the First Amendment." 459 U.S. at 122 n.5. There is no basis to afford greater protection to the interests safeguarded by the Establishment Clause than the Free Speech Clause.[6] Thus, the Court of Appeals' use of an "added presumption" of constitutionality to shift the burden to the petitioners to prove the invalidity of the price advertising ban under the First Amendment can not be squared with the fact that no such exception appears in the application to regulation of alcoholic beverages of other constitutional provisions, including the Commerce Clause and the Establishment Clause.

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[6] This is not to say that the Free Speech Clause and the Establishment Clause operate in an identical fashion. *See, Lee v. Weisman*, ___ U.S. ___, 112 S. Ct. 2649, 2647 (1992). However, the Court has not recognized a hierarchy in the clauses whereby one is entitled to more weight than the other.

California v. LaRue and the later cases of *Doran v. Salem Inn, Inc.*, 422 U.S. 922, (1975) and *New York State Liquor Authority v. Bellanca, supra,* should be limited to their particular peculiar circumstances. In those cases, the Court upheld under the Twenty-first Amendment the states' power to ban *nude dancing on licensed premises* because it was upholding a licensing provision rather than a regulation of communication.

> In *LaRue* . . . we concluded that the broad powers of the States to regulate the sale of liquor, conferred by the Twenty-first Amendment, outweighed any First Amendment interest in nude dancing and that a State could therefore ban such dancing as a part of its liquor license program. *Doran v. Salem Inn, Inc., supra,* 422 U.S. at 932-933.

While nude dancing has some communicative aspect, it is also conduct with a concomitant risk of provoking or facilitating illegal activity on the licensed premises. The Court's opinion graphically described "numerous incidents of legitimate concern:"

> Customers were found engaging in oral copulation with women entertainers; customers engaged in public masturbation; and customers placed rolled currency either directly into the vagina of a female entertainer, or on the bar in order that she might pick it up herself. Numerous other forms of contact between the mouths of male customers and the vaginal areas of female performers were reported to have occurred. Prostitution occurred in and around such licensed premises, and involved some of the female dancers. Indecent exposure to young girls, attempted rape, rape itself, and assaults on police officers took place on or immediately adjacent to such premises. 409 U.S. at 111.

This Court has never held that the Twenty-first Amendment would justify a ban on pure speech on licensed premises.[7] Instead, the Court minimized the communicative aspect of the performances by describing them as "gross sexuality." 409 U.S. at 118. Plainly, the Court was concerned with the conduct rather than communication in *LaRue*.

> [A]s the mode of expression moves from the printed page to the commission of public acts that may themselves violate valid penal statutes, the scope of permissible state regulations significantly increases. States may sometimes proscribe expression that is directed to the accomplishment of an end that the State has declared to be illegal when such expression consists, in part, of "conduct" or "action." 409 U.S. at 117.

In contrast here, Rhode Island is attempting to ban speech that occurs off the licensed premises, and does no more than convey helpful, accurate information about a lawful product.

B. The Court Of Appeals Improperly Reversed The Allocation Of The Burden Of Proof Mandated By This Court.

Shortly before the decision of the Court of Appeals was announced, this Court reemphasized that "[c]ommercial speech that is not false, deceptive, or misleading can be restricted, but only if the State shows that the restriction directly and materially advances a substantial state

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[7] Ironically, considering the Appeals Court's reliance upon *LaRue*, the speech Rhode Island seeks to ban off the licensed premises, communication about prices, is permitted on the licensed premises.

interest in a manner no more extensive than necessary to serve that interest." *Ibanez v. Florida Dept. of Business and Professional Regulation, supra,* ___ U.S. ___, 114 S. Ct. at 2088 (1994). The Court of Appeals, probably influenced by "the presumption based upon the Twenty-first Amendment" (App. 9), not only failed to follow that decision and the earlier decisions upon which it was based, it disregarded the District Court's findings of fact. In improperly making its own "election among conflicting facts," and choosing "which competing inferences to draw from undisputed basic facts," *Irons v. Federal Bureau of Investigation,* 811 F.2d 681, 684 (1st Cir. 1987), the Court of Appeals did not give the District Court's findings of fact the deference to which they were entitled under the proper standard of review, *Anderson v. City of Bessemer City,* 470 U.S. 564, 573-574 (1985), and affectively reversed the allocation of the burden of proof mandated by this Court.

The Court of Appeals did recite that the "burden is on the party seeking suppression, here the State" to prove that the regulation of commercial speech "directly advances" the asserted governmental interest. (App. 5); *Edenfield v. Fane,* ___ U.S. ___, 113 S. Ct. 1792, 1803 (1993). However, in deciding that the District Court was not "free to choose" between competing factual contentions, (App. 6), the Court of Appeals gave the restriction on commercial speech presumptive validity, put the burden of proving invalidity on the petitioners and took a giant step back from the strictures imposed by this Court on the regulation of commercial speech.

> The State's burden is not slight; the "free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the

> false, the helpful from the misleading, and the harmless from the harmful." *Zauderer, supra,* 471 U.S., at 646, 105 S. Ct., at 2279. "[M]ere speculation or conjecture" will not suffice; rather the State "must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield, supra,* at ___, 113 S. Ct., at 1800; see also *Zauderer, supra,* 471 U.S., at 648-649, 105 S. Ct., at 2280-2281 (State's "unsupported assertions" insufficient to justify prohibition on attorney advertising; "broad prophylactic rules may not be so lightly justified if the protections afforded commercial speech are to retain their force"). *Ibanez v. Florida Dept. of Business and Professional Regulation, supra,* 114 S. Ct. at 2089.

Despite the freshness of that declaration and the clear pronouncements of this Court that preceded it, by accepting the state's rationale without requiring affirmative proof, the Court of Appeals required the petitioners to show affirmatively that the state's regulation did not advance its interest in reducing consumption of alcoholic beverages to a material degree, thereby effectively reversing the state's burden of proof under *Central Hudson.*

C. Rhode Island's Ban On Advertising The Price At Which Retailers Sell Alcoholic Beverages Does Not Directly Advance Its Interest In Promoting Temperance To A Material Degree Thereby Failing The Third Part Of The Central Hudson Test.

Under *Central Hudson* there must be an "immediate connection" between the government's interest and the prohibition on speech. If the connection is "tenuous" or "highly speculative" the prohibition is invalid. 447 U.S. at 569. A prohibition on commercial speech is not valid if it

provides only "ineffective or remote support for the government's purpose." 447 U.S. at 564. Last year the Court saw fit to reemphasize the point. "[A] governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield v. Fane, supra,* 113 S. Ct. at 1800. It did so again in *Ibanez, supra,* emphasizing that "[t]he State's burden is not slight." 114 S. Ct. at 2089.

The only governmental interest offered in support of Rhode Island's price advertising ban is the promotion of temperance, which the Rhode Island Supreme Court has defined as "reducing the consumption of liquor." *S & S Liquor Mart, Inc. v. Pastore, supra,* 497 A.2d at 734 (1985). The only connection posited between the price advertising ban and the state's interest is the prevention of "price wars," which would produce lower prices that would, in the state's unsupported view, stimulate consumption.

The essence of the Court of Appeals' reason for permitting Rhode Island to stifle "the free flow of commercial information," and the essence of its misapprehension of the law, is in its holding that the District Court could not find the statute unconstitutional "in the absence of any affirmative contradiction [to the State's hypothesis] to rely on." (App. 7). To the contrary, not only did the state fail to carry its burden *to prove* that the restriction promoted its interest in temperance *"to a material degree," Edenfield v. Fane, supra,* 113 S. Ct. at 1803 quoted in *Ibanez, supra,* 114 S. Ct. at 2089 [emphasis added], the petitioners' evidence convinced the District Court that "Rhode Island's off-premises liquor price advertising ban has no significant impact on levels of alcohol consumption in Rhode Island." 44 *Liquormart, Inc. v. Racine, supra,* (App.

31). Indeed, there is no empirical evidence in the record to support the conclusion that Rhode Island's price advertising ban has had a material effect on its asserted goal. *Ibanez v. Florida Dept. of Business and Professional Regulation, supra,* 114 S. Ct. at 2089. That proposition is refuted by the fact that Rhode Island was in the top 30 percent of states in per capita consumption with the ban in place![8] *44 Liquormart, Inc. v. Racine, supru,* (App. 23).

One way of measuring the "immediate connection" between the government's interest and its prohibition of speech, which was ignored by the Court of Appeals, is to examine the degree to which the state attempts to further its asserted goal through regulation. Rhode Island does not regulate all, or even any, advertising of alcoholic beverages other than price advertising. This underinclusion emphasizes the lack of connection between the regulation and the proffered governmental interest.

> By their own terms, therefore, the State's regulatory aims in this area are narrow. Although a state regulatory scheme obviously need not amount to a comprehensive attack on the problems of alcohol consumption to constitute a valid exercise of state power under the Twenty-first Amendment, the selective approach Oklahoma has taken toward liquor advertising suggests limits on the substantiality of the interests it asserts here. *Capital Cities Cable, Inc. v. Crisp, supra,* at 715.

That Rhode Island leaves the alcoholic beverages industry free to employ a wide variety of advertising techniques underscores the tenuous connection between

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[8] The Court of Appeals did not acknowledge this salient fact.

its asserted interest and the prohibition on price advertising. In *City of Cincinnati v. Discovery Network, Inc.*, ___ U.S. ___, 113 S. Ct. 1505 (1993) the Court stressed that underinclusion vis-a-vis the asserted interest supports finding a restriction of commercial speech to be invalid.

> The fact that the regulation "provide[d] only the most limited incremental support for the interest asserted" . . . – that it achieved only a "marginal degree of protection" . . . for that interest – supported our holding that the prohibition was invalid. 113 S. Ct. at 1515 [citations omitted].

Edenfield v. Fane, supra, strengthens the argument that the fact that Rhode Island permits virtually all advertising, while restricting only advertising of prices, shows that the price advertising ban is not substantially related to the asserted interest in temperance.

> The State has identified certain interests in regulating solicitation in the accounting profession that are important and within its legitimate power, but the prohibitions here do not serve these purposes in a direct and material manner. *Where a restriction on speech lacks this close and substantial relation to the governmental interests asserted, it cannot be, by definition, a reasonable time, place, or manner restriction.* 113 S. Ct. 1801-1802 [Emphasis added].

The Court of Appeals disregarded the district judge's findings of fact because it thought the state's position had "inherent merit." (App. 7). But given the fact that Rhode Island, with its price advertising ban in effect for thirty-four years, was indisputably in the top thirty percent of states in per capita alcohol consumption, the effect on consumption could be no more than marginal. The Court of Appeals' logic is no more than a hypothesis that does

not fit the facts. The price advertising ban does not materially advance the asserted interest of Rhode Island, and the state has failed to demonstrate a "reasonable 'fit' between the legislature's ends and the means chosen to accomplish those ends." *Board of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 480 (1989).

It is superficially appealing to speculate, as did the Court of Appeals, that consumption may be promoted by lower prices that could result from price advertising. (App. 7). However, without some evidence to show a real and material effect, the *Central Hudson* test is not satisfied. Moreover, common sense dictates that if the state's theory is correct, there should be empirical evidence to support it. Our experts showed that there are many intervening variables between price advertising and consumption, such as differences in drinking attitudes and customs, which are the most important determinants of drinking behavior, so a direct link can not be made. *44 Liquormart, Inc. v. Racine, supra* (App. 27).

The fact that Rhode Island is in the top 30 percent of states in per capita alcohol consumption, with its price advertising ban in place for thirty-four years, is fully consistent with the findings of several governmental agencies that have looked at the relationship between price or advertising and consumption. In 1964, the Moreland Commission was appointed by the governor of New York to study that State's minimum price requirement for liquor. The Commission found that "[t]he argument that high prices promote temperance in that they keep liquor out of the hands of those who should not have it is unfounded." New York State Moreland Commission on the Alcoholic Beverage Control Law, *Report and Recommendations No. 3*, 17, January 21, 1964. The Commission

compared states in which prices were high with states in which prices were low. Annual arrests for drunkenness, drunk driving, rates of alcoholism, and rates of alcohol-related first mental hospital admissions were examined to find no relationship between consumption patterns in the "low" and "high" price states. *Id.* at 18-19. The Commission concluded "artificially high prices for liquor have no substantial relationship to temperance. They serve merely to insure the profit margins of the various segments of the industry."[9] *Id.* at 19.[10] In 1985, the Federal Trade Commission found "no evidence to believe alcohol advertising significantly affects alcohol abuse." *44 Liquormart v. Racine, supra* (App. 24).

Despite its proffered concern with promoting temperance, Rhode Island permits all forms of advertising which tries to directly stimulate the desire to consume a particular brand of alcoholic beverage. Consumers are denied only price information. As the Rhode Island Supreme Court humorously put it: "Rhode Islanders' thirst for alcoholic-beverage advertising will have to be quenched through the electronic and print media constantly reminding them of such thoughts as 'This Bud's for you' or 'It's Miller Time.' " *S & S Liquor Mart, Inc. v.*

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[9] Thus is manifested the interest of the Rhode Island Liquor Stores Association in preserving high profit margins at the expense of consumers under the guise of promoting temperance.

[10] The Moreland Commission Report has been noticed by several courts in ruling on alcoholic beverages related issues. *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 348, 351 fn.13 (1987), *Michigan Beer & Wine Wholesalers Association v. Attorney General, supra*, 370 N.W.2d at 336; *Rice v. Alcoholic Beverage Control Appeals Bd.*, 21 Cal. 3d 431, 457 (1978); *Seagram & Sons v. Hostetter*, 16 N.Y.2d 47 (1965).

Pastore, 497 A.2d 729, 734 (1985). A consumer who has thereby been persuaded that it is "Miller time" and sets out to buy a six-pack will be able to check the advertisements and find many places where Miller beer is sold, but not know which one offers the best price. Common sense says that this will not dissuade the purchase, but only enable retailers to maintain high margins at the consumer's expense. Rhode Island's expert presented no empirical data to the contrary.

In asserting that "advertising must be generally productive or so much money would not be spent on it" the Court of Appeals did not consider two salient facts: expenditures on alcoholic beverages advertising have been steadily increasing, while consumption has been steadily decreasing; and, Rhode Island, with its price advertising ban in place for many years, is in the top 30 percent of states in per capita consumption. 44 *Liquormart v. Racine, supra,* (App. 23). The state just did not present any evidence that its ban on price advertising had any material influence on the level of consumption. Moreover, "so much money" is spent on the kind of advertising campaigns, such as "this Buds for you" and "it's Miller time," *that are permitted* in Rhode Island. Those campaigns are directed toward increasing sales of the advertiser's brands at the expense of competitor's brands.[11]

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[11] The assumption that the alcoholic beverages industry would not spend money on advertising unless it generated increased consumption underlies all the cases upholding advertising bans. Those courts do not appreciate the fact that advertising influences a person who has already decided to buy an alcoholic beverage in choosing which brand to buy. In a "mature market," such as the market for alcoholic beverages, the purpose and effect of a particular company's advertising is to

Retailers like the petitioners want to advertise their prices to increase their share of the market of those who have already decided to consume, but not selected where they will acquire the product. *44 Liquormart v. Racine, supra,* (App. 30). Consequently, Rhode Island turns the logic of its position upside down by banning only that advertising least likely to increase sales, while permitting advertising most likely directed at increasing sales. Surely, it cannot be said that the District Court's finding that the price advertising ban has no material effect on consumption is clearly erroneous. *Anderson v. City of Bessemer City, supra.*

Beyond the fact that the findings of the District Court are not clearly erroneous, so that no connection has been shown between price advertising and consumption, the price advertising ban is, at best, theoretically only indirectly related to the promotion of temperance, and thus does not satisfy the third part of the *Central Hudson* test. A direct relationship is manifested when there is something about the content or particular adverse effect of the commercial speech that is a harm to the public interest legitimately to be avoided. As the Court noted in *Central Hudson,* "in recent years this Court has not approved a blanket ban on commercial speech *unless the expression itself was flawed in some way, either because it was deceptive or related to unlawful activity*" 447 U.S. at 566, n. 9 [emphasis added].

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encourage consumers to choose that brand, not to increase general consumption of the generic product. M. J. Waterson, ADVERTISING BRANDS AND MARKETS, 19 (Advertising Ass'n Monograph, 2nd ed. 1985). If advertising takes a customer away from a competitor's product it is money well spent, although it does not increase overall consumption by so much as one bottle.

In this case, the state's argument manifests the indirect nature of the price advertising ban's purported effect on temperance. Rhode Island does not argue, and certainly has not proven, that price advertising itself stimulates consumption. Price advertising inherently only informs the public of the price at which the advertiser is offering alcoholic beverages for sale. As such, it has no particular adverse effect that causes harm. Under the state's attenuated reasoning, price advertising itself is not harmful, it is merely a means of facilitating the "price wars" which the state believes might occur and might have the effect of lowering an "artificial price floor" that might result from the public's ignorance of retail prices might increase consumption. Therefore, the regulation is not "aimed at either the content of the speech or the particular adverse effects stemming from that content."

D. Rhode Island's Ban On Advertising The Price At Which Retailers Sell Alcoholic Beverages Is More Extensive Than Necessary To Serve The State Interest In Promoting Temperance.

The final part of the *Central Hudson* test requires the state to demonstrate that its restriction on commercial speech is "not more extensive than is necessary to serve" the state's interest. 447 U.S. at 566. The test has been articulated as requiring the proponent of a restriction on commercial speech to prove a "reasonable 'fit' between the legislature's ends and the means chosen to accomplish those ends." *Board of Trustees of State Univ. of New York v. Fox, supra,* 492 U.S. at 480. The Court has most recently explained that a rational basis test, advanced by the state and adopted by the Court of Appeals, is *not* to

be applied when deciding the constitutionality of restrictions on commercial speech.[12]

> [W]hile we have rejected the "least-restrictive-means" test for judging restrictions on commercial speech, so too have *we rejected mere rational basis review*. A regulation need not be "absolutely the least severe that will achieve the desired end," *Fox, supra*, 492 U.S., at 480, 109 S. Ct., at 3035, but if there are numerous and obvious less-burdensome alternatives to the restriction on commercial speech, that is certainly a relevant consideration in determining whether the "fit" between ends and means is reasonable. *City of Cincinnati v. Discovery Network, Inc., supra*, 113 S. Ct. 1510, fn.13 [emphasis added].

Because there is nothing inherently bad about truthfully informing the public of the price at which lawful commodities are offered for sale, the only justification for the advertising ban is to keep prices above "an artificial price floor," a result Rhode Island could directly accomplish without any restriction on speech by mandating minimum consumer prices or increasing its tax on alcoholic beverages. Since, if this were really its goal, the state could fully accomplish it without restricting speech at all, *i.e.*, in a manner obviously less-burdensome to free expression, it is self evident that its ban on price advertising is more extensive than is necessary. The Court of Appeals' decision authorizes government to make a "reasonable choice" to covertly manipulate citizens' consumption patterns by withholding relevant, truthful,

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[12] The Appeals Court held that the state need not prove the "correctness" of its position, only its "reasonableness." Slip Op. at 6.

product information when it could fully accomplish its objective of preventing price wars without any restriction on speech. However, this Court "demand[s] a higher level of rationality when you're prohibiting the conveying of information." *Bentsen v. Coors Brewing Company*, No. 93-1631, Transcript of Oral Argument, November 30, 1994, p.10 (Scalia, J.).

E. The Court Of Appeals Conflicted With The Decisions Of This Court In Ruling That Rhode Island May Ban Advertisement By Out Of State Retailers Of Alcoholic Beverages.

In the case of its prohibition against newspapers and other communications media accepting out of state price advertisements, Rhode Island bans accurate speech related to lawful activity that not only occurs off licensed premises, but concerns the sale of products outside its jurisdiction. The Twenty-first Amendment does not empower the states to regulate economic activity beyond their borders.

> New York has a valid constitutional interest in regulating sales of liquor within the territory of New York. Section 2 of the Twenty-first Amendment, however, speaks only to state regulation of the "transportation or importation into any State . . . for delivery or use therein" of alcoholic beverages. That Amendment, therefore, gives New York only the authority to control sales of liquor in New York, and confers no authority to control sales in other States. *Brown-Forman Distillers Corporation v. New York State Liquor Authority, supra*, 476 U.S. at 585.

See, also, Healy v. The Beer Institute, supra.

Contrary to the decision of the Court of Appeals, (App. 10-12), Rhode Island may not justify its out of state

price advertising ban on the ground that it is attempting to protect its citizens from the intemperant influence of lower liquor prices in other states.

> A State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State. It may seek to disseminate information so as to enable its citizens to make better informed decisions when they leave but *it may not, under the guise of exercising internal police powers, bar a citizen of another State from disseminating information about an activity that is legal in that State. Bigelow v. Virginia*, 421 U.S. 809, 824-825 (1975) [emphasis added].

Incredibly, the Court of Appeals justified Rhode Island's ban on price advertising by out of state retailers with the *non sequitur* "if a party wishes to come into a state and do business, to some extent at least, it should be subject to the same regulations as are its local counterparts." (App. 10-11). Not only does this pronouncement sanction "economic protectionism" as a legitimate reason for banning out of state business solicitation, the Court of Appeals erred by not measuring the price advertising ban against the reason offered by the state to justify it: preventing price wars among Rhode Island retailers.

Despite the suggestion of the Court of Appeals, (App. 10-12), our argument is based upon the application of the First Amendment and not upon application of the Commerce Clause. Under the *Central Hudson* analysis, the state must justify regulating commercial speech by showing how its regulation will alleviate real harms in that state to a material degree. The justification for the price advertising ban advanced by the state simply disappears when applied to the ban on communications media

accepting advertisements for out of state retailers. Advertisements of out of state prices cannot promote price wars within Rhode Island. While Rhode Island's hidden agenda is likely to be to protect its retailers from competition in other states, such "economic protectionism" is impermissible.[13] *Bacchus Imports, Ltd. v. Dias, supra.* Although the Court of Appeals made an issue of finding petitioners' claims under the Commerce Clause waived, (App. 11-12), it missed the point that the Commerce Clause made Rhode Island's objective of regulating out of state conduct by its citizens illegitimate, thereby invalidating its regulation of price advertising under the First Amendment.

CONCLUSION

The United States Court of Appeals for the First Circuit improperly held, in conflict with the Fifth Circuit, that the Twenty-first Amendment gives an added presumption of validity to a state's ban on advertising the price at which a retailer sells alcoholic beverages. It permitted a restriction on speech to stand in the face of substantial evidence of, and findings by the District Court that, the restriction did not materially advance the state's interest and was more burdensome than necessary when the state's interest could be fully served without restricting speech at all. The petitioners respectfully submit that their petition for a *Writ of Certiorari* to the United

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[13] The Rhode Island Supreme Court would go only so far as to find "some doubt concerning the nexus between §3-8-8.1 and the asserted state interests" in promoting temperance. *Rhode Island Liquor Stores Association v. Evening Call Pub. Co.*, 497 A.2d 331, 338 (1985).

States Court of Appeals for the First Circuit should be granted.

By their attorney,

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UNITED STATES COURT OF APPEALS

For the First Circuit

No. 93-1893

44 LIQUORMART, INC. AND
PEOPLES SUPER LIQUOR STORES, INC.,

Plaintiffs, Appellees,

v.

STATE OF RHODE ISLAND,

Defendant, Appellee,

RHODE ISLAND LIQUOR STORES ASSOCIATION,

Intervenor, Appellant.

No. 93-1927

44 LIQUORMART, INC. AND
PEOPLES SUPER LIQUOR STORES, INC.,

Plaintiffs, Appellees,

v.

STATE OF RHODE ISLAND,

Defendant, Appellant.

APPEALS FROM THE
UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF RHODE ISLAND

[Hon. Raymond J. Pettine,
Senior U.S. District Judge]

Before

Cyr, *Circuit Judge*,
Aldrich, *Senior Circuit Judge*,
and Stahl, *Circuit Judge*.

Lauren E. Jones with whom *Caroline C. Cornwell*, *Jones Associates*, *William P. Gasbarro* and *Robert M. Brady* were on brief for Rhode Island Liquor Stores Association.

Rebecca Tedford Partington, Special Assistant Attorney General, with whom *Jeffrey B. Pine*, Attorney General, was on brief for State of Rhode Island.

Evan T. Lawson with whom *Lawson & Weitzen* was on brief for plaintiffs-appellees.

October 24, 1994

ALDRICH, *Senior Circuit Judge*. The State of Rhode Island, that did not ratify the Eighteenth Amendment, and was among the earliest to ratify the Twenty-First that repealed it, in 1956 adopted two statutes, assertedly aimed at promoting temperance, forbidding advertising the price of intoxicating liquor, except at the place of sale if sold within the state. The "declared purpose is the promotion of temperance and for the reasonable control of the traffic in alcoholic beverages." R.I. Gen. Laws § 3-1-5.

R.I. Gen. Laws § 3-8-7 provides,

> **3-8-7. Advertising price of malt beverages, cordials, wine or distilled liquor.** – No manufacturer, wholesaler, or shipper from without

> this state and no holder of a license issued under the provisions of this title and chapter shall cause or permit the advertising in any manner whatsoever of the price of any malt beverage, cordials, wine or distilled liquor offered for sale in this state; provided, however, that the provisions of this section shall not apply to price signs or tags attached to or placed on merchandise for sale within the licensed premises in accordance with rules and regulations of the department.

Section 3-8-8.1, *post*, enlarges this language to forbidding making "reference to the price of any alcoholic beverage,"[1] that defendant Rhode Island Liquor Control Administrator, a strict enforcer, construes as including remote references such as "WOW!"

In this action plaintiffs, 44 Liquormart, Inc. and Peoples Super Liquor Stores, Inc., having sufficient standing to attack these statutes in every particular, seek a declaration against the Administrator (hereinafter the State) of unconstitutionality as contravening the First Amendment. Rhode Island Liquor Stores Association (Association) has intervened as a party defendant. After a bench trial, in an extensive opinion the court found for plaintiffs. Defendants appeal. They succeed with respect to limiting advertising by Rhode Island vendors.

The stage it set below is described by the State.

> [T]he advertising ban directly advanced the governmental interest by increasing the cost of alcoholic beverages, thereby lowering the

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[1] *See also* Liquor Control Adm. Reg. 32.

> amount of alcohol consumption by residents of the State of Rhode Island. . . . [T]he State's power to totally ban any advertising about alcoholic beverages necessarily included the lesser power to restrict price advertising.

Further, the State contended that plaintiffs, in order to rely on the First Amendment, must "prove that the four part *Central Hudson* test could not be met."

Association, a group of small liquor stores, whose intervention as a co-defendant was not opposed by the State, alleged as its ground for intervening that if advertising of prices were to be allowed, its members "would be obliged to participate in the advertising arena and would be at a definite disadvantage when matched up against retailers who hold multiple licenses." This complaint was later bolstered by adding that competitive price advertising would tend to lower prices, and that "a more competitive market for alcohol might be considered an undesirable goal."

We start with the four issues that *Central Hudson* raises when a state's interest conflicts with the rights of a would-be commercial speaker.

> At the outset, we must determine whether the expression is protected by the First Amendment. [I] For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. [II] Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine [III] whether the regulation directly advances the governmental interest asserted, and [IV] whether it is not more extensive than is necessary to serve that interest.

Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557, 566 (1980). The ultimate purpose is to weigh "the expression [and] the governmental interests served by its regulation." *Id.* at 563.

I. In the present case the first test raises no question. II. For the second it was stipulated, "The State of Rhode Island has a substantial interest in regulating the sale of alcoholic beverages." Plaintiffs concede that promoting temperance is such an interest. The dispute, accordingly, is whether forbidding price advertising "directly advances" temperance, and "is not more extensive than is necessary." There is a further question with regard to local advertising by an out-of-state vendor.

III. "Directly advances." We start with the burden of proof. The burden is on the party seeking suppression, here the State. *Edenfield v. Fane*, 113 S. Ct. 1792, 1800 (1993). But to what extent? The district court held that it was an issue for it to decide, unfettered, between competing witnesses, and since, on its weighing the evidence, the court was not persuaded that the State was correct, it failed. We do not think the burden that strict. It is not correctness, it is reasonableness.

In the first place, the term "directly advances" is not absolute. *Edenfield*, 113 S. Ct. at 1800 ("alleviate to a material degree"); *Trustees of the State University of New York v. Fox*, 492 U.S. 469, 480 (1989) ("reasonable fit"). *See also Posadas de Puerto Rico Assoc. v. Tourism Co.*, 478 U.S. 328, 342 (1986) ("reasonable"). And while the state has the burden, in *California v. LaRue*, 409 U.S. 109, 118-19 (1972), the Court spoke of "the added presumption in favor of the validity of the state regulation in this area

that the Twenty-First Amendment requires." Historically the state has failed where the evidence was "at most, tenuous," *Central Hudson*, 447 U.S. at 569; "unsupported assertions: nowhere does the State cite any evidence or authority of any kind," *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 648 (1985); lack of studies or "anecdotal evidence," *Edenfield*, 113 S. Ct. at 1800. Warrantable inferences, however, may be sufficient. *Posadas*, 478 U.S. at 341-42 (advertising). What should a court do when there is no empirical[2] evidence either way, and expert opinions go both ways? Even plaintiffs' expert, whom the court credited, admitted that "advertising has cumulative effects that are difficult to detect in studies, and that research studies have been varied and equivocal because it is a difficult topic to research." Should the court be free to choose?

IV. Before answering these questions we observe that the "not more extensive than is necessary" inquiry is subject to the same considerations. *Re R.M.J.*, 455 U.S. 191, 207 (1982) ("reasonably necessary"). The district court did not deal with this directly, except to note the concession of the State's expert that "the objective of lowering consumption of alcohol by banning price advertising could be accomplished by establishing minimum prices and/or by increasing sales taxes on alcoholic beverages." This is not an answer; the State is entitled to a reasonable choice. This includes choice of method – it is not obliged to prove that some other method, e.g., taxation, would be less effective. *Cf. Fox*, 492 U.S. at 478.

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[2] This word is a summary of the court's findings that such studies as were offered were too inconclusive to be relied on.

Returning to our questions, there would seem inherent merit in the State's contention that competitive price advertising would lower prices, and that with lower prices there would be more sales. We would enlarge on this. There are doubtless many buyers whose consumption is sometimes measured by their free money. If a buyer learns that plaintiffs charge less, is he not likely to go there, and then buy more? Correspondingly, if ignorant of lower prices elsewhere, will he not tend to buy locally, at the higher price, and thus buy less? *See* Stanley I. Ornstein and Dominique M. Hanssens, *Alcohol Control Laws and the Consumption of Distilled Spirits and Beer,* 12 J. Consumer Res. 200 (September 1985). Further, if Association members would fight plaintiffs' advertised prices, as they presage, by lowering their own, then, again, might there not be more buys?

Even plaintiffs' witness Smart conceded that some believed this inference reasonable.

> What I'm aware of are studies that show that people generally decide how much money they have to spend on alcoholic beverages per week or per month. Then they tend to spend that amount, and if they can spend it in one way, they'll do it and in another way they'll do that as well.

Advertising must be generally productive, or so much money would not be spent on it. *Posadas,* 478 U.S. at 341-42; *Oklahoma Telecasters Ass'n v. Crisp,* 699 F.2d 490, 501 (10th Cir. 1983), *rev'd on other grounds sub nom Capital Cities Cable, Inc. v. Crisp,* 467 U.S. 691 (1984). We do not consider, in the absence of any affirmative contradiction to rely on, that the district court was free to hold it

unreasonable. In addition, the presumption based upon the Twenty-First Amendment, *LaRue, supra,* seems precisely in order.

Parenthetically, the State contends this discussion to be unnecessary in view of the Court's action, 459 U.S. 807 (1982), dismissing an appeal, "for want of substantial federal question," from the decision in *Queensgate Investment Co. v. Liquor Control Commission,* 69 Ohio St.2d 361 (1982), a price advertising limitation case. The district court rejected this contention because of a "different factual predicate," and because "a summary dismissal lacks a reasoned opinion." As to the latter, it is settled that such action has precedental [sic] effect, although not necessarily on the identical reasoning of the court. *Mandel v. Bradley,* 432 U.S. 173, 176 (1977). As to facts, the Ohio case involved a statute similar to the one at bar. Defendant restaurant advertised, in a circular, 50 cent drinks – a markdown – with meals. We see no relevant factual distinction.

The Ohio court, recognizing that commercial speech was entitled to some protection, pursued the four *Central Hudson* tests and found that the statute was "not unreasonable" in light of the Twenty-First Amendment's authorization to curb the evils of alcoholic beverages. 690 Ohio St.2d at 366. It concluded as follows.

> The regulation is directed toward regulation of the intoxicants themselves, rather than speech. This is unlike the case, e.g., in [*Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748 (1976),] where the speech was the actual focus of the regulation,

> sinc[illegible] the aim of the restriction was the prevention of competition in pharmaceutical sales, not the discouragement of pharmaceutical purchases.

Ibid.

Reliance on *Queensgate* as conclusive, however, might raise possible questions. The first is whether the Court would have said there was no federal question if free speech had been curtailed by a regulation clearly unrelated to liquor. We need not answer this because we have found that the State's action was reasonable as a control. But suppose the primary purpose was that eliminated by the *Queensgate* court? On the issue of purpose the State is not helped by its friends. Association's given reason for wanting to intervene as a defendant, that the statute protects the small vendor from the giants, could make logical sense, but might not be a lawful use of the Twenty-First Amendment. *Cf. California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984). We need not resolve this question either, however. There is a burden to rebut the statutes' declared purpose, and plaintiffs have made no attempt. We conclude therefore that, with *Queensgate* or without, plaintiff 44 Liquormart must lose.

Finally, we observe that our conclusion coincides with the Rhode Island court's. *Rhode Island Liquor Stores Ass'n v. Evening Call Pub. Co.*, 497 A.2d 331 (R.I. 1985); *S & S Liquor Mart, Inc. v. Pastore*, 497 A.2d 729 (R.I. 1985). We have not mentioned its decisions hitherto because our obligation is to decide for ourselves. *See Watson v. Estelle*, 886 F.2d 1093, 1095 and n.3 (9th Cir. 1989).

People Super Liquor Stores, a Massachusetts vendor that wishes to advertise its Massachusetts prices in Rhode Island, has a different case. Because of R.I. Gen. Laws § 3-8-8.1 no Rhode Island publisher will accept advertisements.

> **3-8-8.1. Price advertising by media or advertising companies unlawful.** – No newspaper, periodical, radio or television broadcaster or broadcasting company or any other person, firm or corporation with a principal place of business in the state of Rhode Island which is engaged in the business of advertising or selling advertising time or space shall accept, publish, or broadcast any advertisement in this state of the price or make reference to the price of any alcoholic beverages. . . .

By the hypothesis under which we are justifying forbidding price advertising by local vendors, State residents, whose shopping opportunity is thus curtailed, will be more likely to purchase at higher-priced neighborhood outlets and less at lower-priced, viz., discount sellers elsewhere. Insofar as this construction is aimed at foreign sellers, it is a deliberate, and, by hypothesis effective, discrimination and restraint on interstate commerce. Thus we have two questions. One, is the State's interest in health and welfare sufficient to overcome the foreign vendors' right of free speech? Two, if so, are the rights given the State by the Twenty First Amendment sufficient to meet the foreign vendors' further objections under the Commerce Clause?

Viewed simply as free speech, if a party wishes to come into a state and do business, to some extent, at least, it should be subject to the same regulations as are its local

counterparts. While the question may be close, where we are dealing simply with commercial speech, whose rights are limited, *Bigelow v. Virginia*, 421 U.S. 809, 818 *et seq.* (1975), we believe the State health interest, as reinforced by the Twenty First Amendment, should empower the State to restrict foreigners as well. Nor do we find support for the contrary in the *Bigelow* opinion. We read the language relied on by Peoples Super Liquor Stores in the light of the fact that the advertisement contained more than commercial speech. *See* 421 U.S. at 822; *Friedman v. Rogers*, 440 U.S. 1, 11, n.10 (1979). Here we have no more than commercial.

The serious question is whether the Twenty First Amendment can prevail against the Commerce Clause when the State is deliberately favoring local vendors against foreign enterprise. The full meaning and effect of this Amendment has been much debated. At a minimum it does not do away altogether with the Commerce Clause. *Cf. Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 331-332 (1964). But, as a matter of dictum, the Court in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, at 276 (1984), has recognized the possibility that a state might discriminate "to promote temperance or to carry out any other purpose of the Twenty First Amendment." We have tentatively explored this question in some depth, and find it difficult.

This raises a problem. The record shows that, initially, Peoples included the Commerce Clause in its contentions. On appeal, it dropped it. While at first we thought that the two principles were so tied together that we should nevertheless consider it, we have concluded that fairness to the State, and, indeed to us, requires that

we do not do so without full briefing and argument. Accordingly, we apply the general principle and hold the Commerce Clause waived. *Interface Group, Inc. v. Mass. Port Authority*, 816 F.2d 9, 16 (1st Cir. 1987). Since without it Peoples must fail, the decision below is reversed, with judgment for defendants.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 93-1893

44 LIQUORMART, INC., AND
PEOPLES SUPER LIQUOR STORES, INC.,
Plaintiffs, Appellees,

v.

STATE OF RHODE ISLAND,
Defendant, Appellee,

RHODE ISLAND LIQUOR STORES ASSOCIATION,
Intervenor, Defendant, Appellant.

No. 93-1927

44 LIQUORMART, INC., AND
PEOPLES SUPER LIQUOR STORES, INC.,
Plaintiffs, Appellees,

v.

STATE OF RHODE ISLAND,
Defendant, Appellant.

JUDGMENT

Entered: October 24, 1994

These causes came on to be submitted on petitions for rehearing.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The decision of the district court is reversed with judgment for the defendants.

Costs to defendants.

By the Court:
/s/ FRANCIS P. SCIGLIANO
Clerk.

ORDER OF COURT

Entered: October 24, 1994

The petition for rehearing filed by Rhode Island Liquor Stores Association and the petition for rehearing by the State of Rhode Island are granted.

The opinion of this court of July 8, 1994 is withdrawn and this court's judgment of July 8, 1994 is vacated.

A new opinion and judgment will issue this date.

By the Court:
/s/ FRANCIS P. SCIGLIANO
Clerk.

ORDER OF THE COURT*

Entered: July 29, 1994

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing submitted by 44 Liquormart, Inc. and its suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular, active service and a majority of said judges not having voted to order that the suggestion for rehearing en banc submitted by 44 Liquormart, Inc., be granted,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc submitted by 44 Liquormart, Inc., be denied.

By the Court:
/s/ FRANCIS P. SCIGLIANO
Clerk.

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*Chief Judge Stephen Breyer did not participate.

44 LIQUOR MART, INC. and People's Super Liquor Stores, Inc., Plaintiffs,

v.

Kate F. RACINE, in her capacity as Rhode Island Liquor Control Administrator, Defendant,

and

Rhode Island Liquor Stores Association, Intervenor-Defendant.

Civ. A. No. 92-0115 P.

United States District Court, D. Rhode Island.

Aug. 10, 1993.

Liquor retailers brought action challenging state statutes prohibiting off-premises advertising of prices at which liquor stores sold alcoholic beverages. The District Court, Pettine, Senior District Judge, held that: (1) Twenty-first Amendment did not require modification of either level or allocation of burden of proof in commercial speech case involving regulation of sale of alcoholic beverages, and (2) state failed to establish that advertising ban directly advanced its interest in reducing alcohol consumption or that ban was not more extensive than necessary to serve such interest.

Ordered accordingly.

Barry J. Kusinitz, Corrente, Brill & Kusinitz, Providence RI, Evan T. Lawson, Lawson & Weitzen, Boston, MA, for plaintiffs.

Rebecca Tedford Partington, RI Atty. General's Office, Providence, RI, for defendant Racine.

William Gasbarro, Robert M. Brady, E. Providence, RI, for intervenor-defendant RI Liquor Stores.

MEMORANDUM AND ORDER

PETTINE, Senior District Judge.

The case presents the question whether R.I.G.L. §§ 3-8-7[1] and 3-8-8.1,[2] and Regulation 32 of the Rhode

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[1] R.I.G.L. § 3-8-7 controls price advertising by licensees. It provides:

> No manufacturer, wholesaler, or shipper from without this state and *no holder of a license issued under the provisions of this title and chapter shall cause or permit the advertising in any manner whatsoever of the price of any malt beverage, cordials, wine or distilled liquor offered for sale in this state;* provided, however, that the provisions of this section shall not apply to price signs or tags attached to or placed on merchandise for sale within the licensed premises in accordance with rules and regulations of the department. (emphasis added).

[2] R.I.G.L. § 3-8-8.1 controls the acceptance of price advertising by Rhode Island communications media and provides as follows:

> *No newspaper, periodical, radio or television broadcaster or broadcasting company or any other person, firm or corporation with a principal place of business in the state of Rhode Island which is engaged in the business of advertising or selling advertising time or space shall accept, publish, or broadcast any advertisement in this state of the price or make reference to the price of any alcoholic beverages.* Any person who shall violate any of the provisions of this section shall be guilty of a misdemeanor and shall be punished for the first offense by a fine in

Island Liquor Control Administration,[3] which collectively prohibit off-premises advertising of the prices at which liquor stores sell alcoholic beverages, violate the First Amendment to the United States Constitution. Jurisdiction is premised on 28 U.S.C. § 1331 and 42 U.S.C. § 1983.

For the reasons stated below, I hold these provisions invalid as an unconstitutional burden upon protected commercial speech.

I. BACKGROUND

Plaintiff 44 Liquor Mart, Inc. ("44 Liquor Mart"), a Rhode Island corporation located in Johnston, Rhode Island, is a licensed retail alcohol dealer. Plaintiff People's

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the sum of fifty dollars ($50) and for each additional offense thereafter by a fine not exceeding the sum of one hundred dollars ($100). Publication or broadcast by any person in violation of the provisions of this section shall also be subject to injunctive proceedings in a court of competent jurisdiction on a complaint brought by a retail licensee, or an association of retail licensees.

The provisions of this section shall not apply to any trade journal which is duly recognized and authorized to be exempt from the provisions of this section by the liquor control administrator. (emphasis added).

[3] Regulation 32 of the Rules and Regulations of the Liquor Control Administrator was enacted to "enforce" the provisions of § 3-8-7. It provides, in pertinent part:

> No placard or sign of any kind which is visible from the exterior of any Class A [package store] premises licensed to sell at retail shall make reference to the price of any alcoholic beverage or mixture of alcoholic beverages.

Super Liquor Stores, Inc. ("People's"), a Massachusetts corporation, is a retail dealer of alcoholic beverages operating retail stores in New Bedford and Fairhaven, Massachusetts.

Defendant Kate F. Racine held the position of Liquor Control Administrator for the State of Rhode Island at the time this action was commenced. Anthony Arico currently holds the title of Acting Liquor Control Administrator. Intervenor-Defendant Rhode Island Liquor Stores Association is a trade group of small retail liquor stores in Rhode Island.

On December 17, 1991, Racine held a hearing to determine whether 44 Liquor Mart had violated R.I.G.L. § 3-8-7 and Liquor Control Administration Regulation 32, which prohibit off-premises advertising of alcohol beverage prices, by placing an advertisement headed "Thanksgiving Harvest" (Plaintiffs' Ex. 4) in a December 1991 edition of the *Providence Journal-Bulletin*, a daily newspaper in Rhode Island. The advertisement displayed bottles of named brand liquors. It also advertised: "State Line Chips" at $1.79, with the price highlighted in a burst form; "Peanuts" at 89 cents a pound with the exclamation "WOW" highlighted in a burst form; "Cigarettes: Cartons and Packs" at various prices for different sizes; and "Schweppes Mixers" at $1.29 a bottle. None of the alcoholic beverages showed any prices, but several of the "WOW" exclamations – highlighted in burst form – appeared next to the displayed bottles.

At the conclusion of the hearing, Racine determined that a violation had occurred. She fined 44 Liquor Mart $400.00, and ordered that the advertisement, as printed,

cease to run. 44 Liquor Mart paid the fine on December 17, 1991. No appeal was taken to the Liquor Control Hearing Board as provided by R.I.G.L. § 3-3-5.

People's, which extensively uses price advertising in Massachusetts, where it is permitted, attempted on several occasions in 1991 and 1992 to place its advertisements, which include price information, in Rhode Island newspapers and other media outlets. It has been refused because of R.I.G.L. § 3-8-8.1, which expressly prohibits the Rhode Island media from advertising retail alcoholic beverage price information.

In addition to the above stated facts, the parties have stipulated to the following:

(1) other liquor licensees, as well as newspapers within the State, have been warned or fined for violations of the Rhode Island regulations;

(2) plaintiffs believe they will each realize an economic benefit of more than $100,000 per year if the price advertising ban is lifted;

(3) defendant Racine vigorously enforces the price advertising ban;

(4) Rhode Island permits all advertising of alcoholic beverages excepting references to price outside the licensed premises;

(5) the State prohibits communications media from accepting any advertisements that refer to prices at which alcoholic beverages are being sold in other states;

(6) Rhode Island communications media reach both Rhode Island and Massachusetts citizens;

(7) the proposed speech does not concern an illegal activity and presumably would not be false or misleading; and

(8) the state of Rhode Island has a substantial interest in regulating the sale of alcoholic beverages.

Defendant Racine defends the constitutionality of the State's ban on price advertising as a measure designed to promote temperance by directly reducing the consumption of alcohol by the citizens of Rhode Island.

II. FINDINGS OF FACT

The following findings of fact are drawn from the transcript of the March 11, 1993 hearing in this case and from my evaluation of two video-taped depositions submitted by agreement of the parties.

At the outset, I note a pronounced lack of unanimity among researchers who have studied the effects of alcohol advertising. No less than twelve different conclusions have been reached regarding the impact of advertising on the general consumption of alcoholic beverages. (Tr. 3/11/93, at 50-51). Numerous studies have attempted to correlate the consumption of alcohol by the general public and certain discreet groups to permitted or proscribed advertising of various alcoholic beverages. Only three that were called to the Court's attention, however, directly deal with price advertising: Jon P. Nelson, *State Monopolies and Alcoholic Beverage Consumption*, 2 J.Reg.Econ. 83 (1990); Gary P. Wilcox, *The Effect of Price Advertising on Alcoholic Beverage Sales*, 25 J. Advertising Res. 33 (1985); and Stanley I. Ornstein and Dominique M.

Hanssens, *Alcohol Control Laws and the Consumption of Distilled Spirits and Beer*, 12 J. Consumer Res. 200 (September 1985). In this setting, experts for the respective parties testified.

Plaintiffs presented two expert witnesses: Dr. Reginald Smart, a Ph.D. in psychology and scientist with the Addiction Research Foundation in Toronto, Canada, and Dr. David J. Pittman, a Ph.D. in human development and professor of psychology at the Washington University in St. Louis. Both experts agreed that some studies have shown that overall alcohol advertising has a slight effect on alcohol consumption. (Tr. 3/11/93, at 50-51, 72; Pittman Dep., 11/10/92, at 12). They each maintained, however, that there is no empirical evidence that the presence or absence of alcohol price advertising significantly affects levels of alcohol consumption.

Dr. Smart focused his opinion on price advertising. He agreed with the three studies by Nelson, Wilson, and Ornstein and Hanssens, *supra*, which concluded that bans on price advertising have no effect on alcohol consumption. Dr. Smart used Rhode Island as a classic example of the fallacy of conclusions to the contrary. Rhode Island, a license state, which has a ban on alcohol price advertising, has "a fairly high level of alcohol consumption, about 2.86 gallons of absolute alcohol per person." (Tr. at 27). It ranks in the upper 30 percent of the states in per capita consumption. (Tr. at 64). In other license states that allow price advertising, alcohol consumption is lower. (Tr. at 65-66).

Dr. Smart also noted that on a national scale, over the past fifteen years, consumption levels generally have

decreased even though overall advertising levels have increased. (Tr. at 64). True, the decline has been fairly small. Nevertheless, it has been consistent year after year. (Tr. at 64). According to Dr. Smart, the mere fact that price advertising may lower sales prices does not mean that per capita consumption will be influenced. It is his conclusion that consumption is influenced by the disposable income available to the individual buyer, that is, the available money remaining after payment of living expenses. (Tr. at 45, 73).

As noted above, Dr. Smart conceded that some researchers have concluded that overall alcohol advertising may have *some* effect on levels of consumption. (Tr. at 50-51, 72). He based his own opinion, however, on research that shows that overall alcohol advertising does not appear to have much effect on alcohol consumption or problems. (Tr. at 24, 72). In addition, he explained, because price advertising is only one part of the total advertising phenomenon, there is no reason to believe that a change in that factor alone would have much of an impact on levels of consumption. (Tr. at 24).

Dr. Smart bolstered his opinion by referring to a 1985 Federal Trade Commission study that found, after reviewing various research, no evidence to believe alcohol advertising significantly affects alcohol abuse. (Tr. at 28). In addition, Dr. Smart supported his testimony with a critique of studies on general alcohol advertising that he believed were inapposite and, at any rate, flawed. (Tr. at 69-71).

In concluding this recitation of the pertinent aspects of Dr. Smart's testimony, I record verbatim particularly persuasive passages:

> A. Well, that study [by Dr. Nelson] was important, I think, in that it established quite clearly that for all states there was no relationship between a price ad ban and no price ad ban when it came to alcohol consumption. States with price ad bans didn't have lower consumption than those who had no such ban and with regard to prices, it's also interesting that Nelson has shown that overall prices are the same in control and license states and here I think we have to remember that license states, almost all license states in the U.S. except for three have no ban on – on prices.[4] Now, one might expect that the prices in license states should be higher than in control states or lower but what we see is essentially no difference. That too suggests to me that probably the price ad ban has no impact.
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> * * *
>
> Also [Atkin and Block] asked people to recall their television advertising or their television viewing but in the Strickland study, respondents reported the number of times they watched various television programs and then investigators determined from records how much total advertising and how much total advertising each person saw and I think they should reduce the problems. They also improved the sampling of students. They had a

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[4] There are certain states that do not license retailers but rather operate state controlled retail stores. (Tr. at 67-68).

stratified sampling procedure. Generally I think the Strickland results are based on a stronger study and they reach conclusions which were quite different than Atkin and Block.

Q. And what were Strickland's conclusions?

A. Strickland's conclusion was that there was no overall correlation between alcohol consumption or problems and alcohol advertising.

Q. Now, when you were being cross examined, you were asked about a number of different studies and statements that you had reported in your paper. Now, were those statements and studies relating to price advertising or to advertising in general?

A. The great majority of them were about advertising in general and not about price advertising at all.

Q. When you were cross-examined, you indicated that you agreed that consumers would travel to obtain lower prices for alcoholic beverages. Do you recall that?

A. Yes, I do.

Q. Now, do you equate the fact that consumers would travel to obtain lower prices for alcoholic beverages with consumers consuming more alcoholic beverages?

A. I don't know of any empirical study that's really shown that, that because people will travel to get alcoholic beverages at a lower price that means they'll necessarily drink more. What – What I'm aware of are studies that show that people generally decide how much money they have to spend on alcoholic beverages per week

> or per month. Then they tend to spend that amount and if they can spend it in one way, they'll do it and in another way they'll do that as well.

(Tr. at 68-71).

Dr. Pittman's testimony concurred with Dr. Smart's as to the insignificance of price advertising on alcohol consumption. (Pittman Dep., 11/5/92, at 20). Dr. Pittman further testified that many other factors besides price influence alcohol consumption levels, including religion, cultural patterns, peer pressure, family make-up, and ethnic background. (Pittman Dep., 11/5/92, at 21-22, Pittman Dep. 11/10/92, at 13-14). Ultimately, he stated that he was unaware of any empirical evidence that would support the conclusion that banning alcohol price advertising promotes temperance. (Pittman Dep., 11/5/92, at 25).

In rebuttal, the defendant presented evidence – although not directly focused on price advertising – that some research groups believe that alcohol advertising leads to increased overall consumption. In her cross-examination of Dr. Smart, counsel for the defendant elicited testimony that the distinguished economist John Kenneth Galbraith and the American Medical Association ("AMA") agree with such a conclusion. (Tr. at 33-37). In 1986, Dr. Smart conceded, the AMA advocated a ban on alcohol advertising with the statement that such advertising affects youthful consumption and influences both brand preferences and the total volume of alcoholic beverages consumed by the public. (Tr. at 33-34). In addition, Dr. Smart acknowledged that advertising has cumulative effects that are difficult to detect in studies, and that

research studies have been varied and equivocal because it is a difficult topic to research. (Tr. at 39-40).

Defendant's expert, Dr. Henry Saffer, a Ph.D. in economics and professor of economics at Kean College in New Jersey, testified that alcohol advertising bans affect alcohol abuse. He stated that in a study he conducted of 17 countries over 14 years,[5] those countries that banned all broadcast advertisements of alcohol had the lowest values for alcohol consumption, liver cirrhosis, mortality rates and motor vehicle fatality rates. (Saffer Deposition, 11/16/92, at 19). Dr. Saffer's testimony, and the conclusions of his international study, are accurately recited by the defendant in her post-trial memorandum:

> Countries with more restrictive advertising policies had the lowest increases in consumption. Countries with bans of spirits advertising have about 16% lower alcohol consumption than countries with no bans. Countries with bans on beer and wine advertising have about 11% lower alcohol consumption than countries with bans only on spirits advertising. Countries with bans on spirits advertising have about 10% lower motor vehicle fatality rates than countries with no bans. Countries with bans on beer and wine advertising have about 23% lower motor vehicle fatality rates than countries with bans only on spirits advertising. The data show that alcohol consumption is related to advertising bans and alcohol price. Liver cirrhosis mortality rates are less consistently related to alcohol

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[5] Henry Saffer, *Alcohol advertising bans and alcohol abuse: An international perspective*, 10 J. Health Econ. 65 (1991) (Saffer Dep. Ex. J).

> advertising bans, but are clearly related to alcohol price.
>
> The ban on price advertising promotes temperance in two ways, by increasing the "search time" involved in finding the best price on alcoholic beverages, and by keeping the actual price of alcoholic beverages higher than they would be if price were allowed to be advertised. Dr. Saffer explained the "search cost" theory as follows: The average price for alcohol would be lower if people could more easily find lower prices. The price advertising ban creates a greater variance of prices in the state than you would have without a ban, which gives people an incentive to shop around, increasing the search costs. If there were no ban on price advertising, the variance of prices would probably decrease and there would be less search time. Dr. Saffer testified that higher prices result in lower alcohol consumption. If the price advertising ban were abolished, it would lower average prices and increase consumption.

Defendant's Post Trial Memorandum at 5-6.

I do not find Dr. Saffer's testimony persuasive. After reviewing his deposition, I conclude that he did not, in any meaningful way, consider a number of variables that influence the public's consumption of alcohol. He did not use any data recognizing ethnic background, income and education levels, or the difference of attitudes and drinking habits that exist in different countries. (Saffer Dep. at 35-42). His complicated studies, in part, correlated more banning of alcoholic beverage advertising with lower levels of consumption, liver cirrhosis and highway fatalities. (Saffer Dep. at 40-41). Yet, the information he had

did not deal only with liver cirrhosis caused by alcohol. He admitted that "environmental factors" can have an effect on this ailment but did not control his study for this factor. (Saffer Dep. at 41). He also acknowledged that he had no information in his foreign country study as to which traffic fatalities were caused by non-alcohol related factors. (Saffer Dep. at 41-42).

I also conclude that while Dr. Saffer knew that the national alcoholic beverage consumption trend for the past ten years has declined, he had no idea of what the trend has been in Rhode Island. (Saffer Dep. at 44). Nor had he made any determination as to how much lower prices might be expected to go if the price advertising ban were lifted. (Saffer Dep. at 45-46). He conceded that many other factors would have to be considered. (Saffer Dep. at 46).

Significantly, Dr. Saffer conceded that the objective of lowering consumption of alcohol by banning price advertising could be accomplished by establishing minimum prices and/or by increasing sales taxes on alcoholic beverages. (Saffer Dep. at 31-32). And while he obviously considered both empirical and theoretical works that move "towards the question of what a socially optimal price is," he was unable to say what that price would be for Rhode Island. (Saffer Dep. at 32).

In addition, Dr. Saffer agreed that banning advertising would not necessarily result in optimal liquor prices. (Saffer Dep. at 34). He further acknowledged that if a company could increase its market share by advertising prices, it could increase its own profits without affecting

overall consumption. (Saffer Dep. at 50-51). Thus, plaintiffs' expectation of realizing additional profits through price advertising has no necessary relationship to increased overall consumption. Finally, Dr. Saffer's studies did not deal with the precise issues presented in this litigation.

Based on the record presented, I find as a fact that Rhode Island's off-premises liquor price advertising ban has no significant impact on levels of alcohol consumption in Rhode Island.[6]

III. RHODE ISLAND PRECEDENT

As a threshold matter, I must note that in *S & S Liquor Mart, Inc. v. Pastore*, 497 A.2d 729 (R.I.1985) and *Rhode Island Liquor Stores Ass'n v. Evening Call Pub. Co.*, 497 A.2d 331 (R.I.1985), the Rhode Island Supreme Court addressed the constitutionality of precisely the same statutes that are challenged here. In both of these cases, the Supreme Court held that the price advertising ban was a valid exercise of the State's powers under the Twenty-first Amendment[7] and did not violate liquor retailers'

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[6] With respect to the narrow issue in this case regarding price advertising of alcoholic beverages, I agree with the various conclusions of Dr. Smart, I wish to emphasize, however, that I make no findings as to the effect that a total or partial ban on general alcohol advertising would have on consumption levels in Rhode Island.

[7] Section 1 of the Twenty-first Amendment repealed the Eighteenth Amendment's prohibition of the manufacture, sale, or transportation of liquor. Section 2 provides:

> The transportation or importation into any State, Territory, or possession of the United States for delivery

First Amendment rights. The defendant argues that this Court should defer to the reasoning and opinion of the Rhode Island Supreme Court and uphold the price advertising ban.

The specter of a direct conflict between the decision of a federal court and the previous decisions of the highest state court in the jurisdiction in which the federal court sits raises delicate issues of comity. Nevertheless, the decisions of the Rhode Island Supreme Court, while persuasive, do not bind this federal court as to issues of federal constitutional law. *See Grantham v. Avondale Indus.*, 964 F.2d 471, 473 (5th Cir.1992) ("It is beyond cavil that we are not bound by a state court's interpretation of federal law regardless of whether our jurisdiction is based on diversity of citizenship or a federal question."); *In re Asbestos Litigation*, 829 F.2d 1233, 1237 (3rd Cir.1987), *cert. denied*, 485 U.S. 1029, 108 S.Ct. 1586, 99 L.Ed.2d 901 (1988) ("The federal district court . . . takes as its authority on federal constitutional issues, decisions of the United States Courts of Appeals and the United States Supreme Court, rather than those of the state supreme court.").

Circuit Judge Selya, as a trial judge, enunciated this principle when he stated: "[I]n construing a state statute, a federal court must defer to the highest court of a state as the best arbiter of state law." *Donahue v. Rhode Island Dept. of Mental Health, Retardation & Hospitals*, 632 F.Supp. 1456, 1478 (D.R.I.1986) (citing *Commissioner v. Estate of*

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or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Bosch, 387 U.S. 456, 462, 87 S.Ct. 1776, 1781, 18 L.Ed.2d 886 (1967) and *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 534, 69 S.Ct. 1233, 1235, 93 L.Ed. 1520 (1949)). Such deference, however, "involves the meaning of the enactment; once the meaning is established, the question of whether or not the ordinance passes constitutional muster is one within the primacy of the federal courts." *Donahue*, 632 F.Supp. at 1478.

I also note that plaintiffs' challenge in this case is readily distinguishable from *S & S Liquor* and *Evening Call* due to the extensive expert testimony and factual record presented. The Rhode Island Supreme Court did not have the benefit of a fully developed factual record and conceded that "[i]t may be that some day, in some litigated case, evidence will be adduced that will support the proposition that these advertising restrictions do not further temperance objectives." *S & S Liquor Mart*, 497 A.2d at 734.

However desirable comity may be, it cannot trump where a federal court is confronted with an issue involving the United States Constitution, "raised by persons who were not parties in the state litigation." *Joseph v. Blair*, 482 F.2d 575, 579 n. 4 (4th Cir.1973), *cert. denied*, 416 U.S. 955, 94 S.Ct. 1968, 40 L.Ed.2d 305 (1974). Thus, it is manifest that I must decide for myself the constitutionality of the statutes at issue.

IV. DISCUSSION

The parties agree that Rhode Island's alcohol price advertising ban implicates plaintiffs' constitutional interests in commercial speech. In order to place my factual

findings in the proper context, it is necessary to review the United States Supreme Court's pronouncements as to the level of protection afforded such speech by the First Amendment.

A. The *Central Hudson* Test

Commercial speech now has a definite niche in the pantheon of rights protected by the First Amendment.[8] In a recent opinion, the Supreme Court summarized the general principles underlying the protection of commercial speech:

> The commercial market place, like other spheres of our social and cultural life, provides a forum where ideas and information flourish. Some of the ideas and information are vital, some of slight worth. But the general rule is that the speaker and the audience, not the government, assess the value of the information presented. Thus, even a communication that does no more than propose a commercial transaction is entitled to the coverage of the First Amendment.

Edenfield v. Fane, ___ U.S. ___, ___, 113 S.Ct. 1792, 1798, 123 L.Ed.2d 543 (1993).

Even while acknowledging this constitutional protection, the Supreme Court's decisions have recognized the " 'common sense' distinction between speech proposing a

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[8] Purely commercial advertisements were once considered to be outside the protection of the First Amendment. *See Valentine v. Christensen*, 316 U.S. 52, 54, 62 S.Ct. 920, 921, 86 L.Ed. 1262 (1942) (Constitution imposes no restraint upon the government with respect to the regulation of "purely commercial advertising").

commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56, 98 S.Ct. 1912, 1918, 56 L.Ed.2d 444 (1978) (citing *Virginia Pharmacy Bd. v. Citizens Consumer Council*, 425 U.S. 748, 771 n. 24. 96 S.Ct. 1817, 1830 n. 24, 48 L.Ed.2d 346 (1976)). These distinctions have led the Court to conclude that "[t]he Constitution . . . affords a lesser protection to commercial speech than to other constitutionally guaranteed expression." *U.S. v. Edge Broadcasting Co.*, ___ U.S. ___, ___, 113 S.Ct. 2696, 2703, 125 L.Ed.2d 345 (1993) (citing *Board of Trustees v. Fox*, 492 U.S. 469, 477, 109 S.Ct. 3028, 3033, 106 L.Ed.2d 388 (1989), *Central Hudson Gas & Electric Corp. v. Public Service Com.*, 447 U.S. 557, 563, 100 S.Ct. 2343, 2350, 65 L.Ed.2d 341 (1980), and *Ohralik*, 436 U.S. at 456, 98 S.Ct. at 1918)).

In *Central Hudson, supra*, the Supreme Court set out a four-part test for assessing government restrictions on commercial speech:

> [First] . . . [the commercial speech] at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

447 U.S. at 566, 100 S.Ct. at 2351. This four-part analysis has endured as the constitutional benchmark in commercial speech cases.

With respect to the burden of proof, the Supreme Court recently reaffirmed that:

> It is well established that "[t]he party seeking to uphold a restriction on commercial speech carries the burden of justifying it." *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 71, n. 20 [103 S.Ct. 2875, 2883, n. 20], 77 L.Ed.2d 469 (1983); *Fox*, 492 U.S., at 480, 109 S.Ct., at 3035. This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.

Edenfield, ___ U.S. at ___, 113 S.Ct. at 1800. Thus, state legislatures must take their constitutional obligations seriously by demonstrating that regulatory measures which burden commercial speakers directly serve concrete and substantial state interests.

B. *Central Hudson* and the Twenty-first Amendment

In the case at hand, the parties do not dispute that the price advertising at issue constitutes commercial speech within the protection of the First Amendment. The parties also stipulate that plaintiffs' proposed price advertising concerns lawful activity and will not be misleading. Further, they agree that Rhode Island has a substantial interest in fostering temperance and that under the Twenty-first Amendment the State has the right to regulate " 'the sale, and the incidents thereof, of alcoholic

beverages, and to protect its citizens from the evils incident to alcohol.' " *S & S Liquor*, 497 A.2d at 732 (quoting *Oklahoma Telecasters Ass'n v. Crisp*, 699 F.2d 490, 500 (10th Cir.1983), *rev'd on other grounds sub nom. Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 104 S.Ct. 2694, 81 L.Ed.2d 580 (1984)). I accept the parties' conclusions and find that the first two prongs of the *Central Hudson* test have been satisfied.

The parties vigorously debate the third and fourth elements of the *Central Hudson* analysis. Specifically, they dispute whether the Twenty-first Amendment requires a shift in both the level and allocation of the traditional burden of proof.

Relying on the State's considerable authority in the area of alcohol regulation (and, indeed, its ability to ban the sale of alcohol altogether) under the Twenty-first Amendment, the defendant contends that the legislature's chosen scheme need only be "reasonably related to," rather than "directly advance," its stated ends in order to withstand constitutional scrutiny. Defendant also contends that, because of the Twenty-first Amendment, the price advertising regulation is entitled to an "added presumption" in favor of its validity. *New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 718, 101 S.Ct. 2599, 2602, 69 L.Ed.2d 357 (1981) (quoting *California v. LaRue*, 409 U.S. 109, 118, 93 S.Ct. 390, 397, 34 L.Ed.2d 342 (1972)). Following the reasoning of the Rhode Island Supreme Court in *S & S Liquor* and *Evening Call*, the defendant suggests that this "added presumption" works to shift the burden of proof to the plaintiffs to show that "these statutes are unconstitutional beyond a reasonable doubt." Defendant's Post-Trial Memorandum at 7.

Respectfully, I find that defendant's reasoning overstates the law in this area, abrogating too broadly other constitutional provisions. The Twenty-first Amendment cannot be read in isolation as a supreme provision impinging all other constitutional rights.

The Twenty-first Amendment is an exception to the Commerce Clause and gives the states broad regulatory authority over interstate commerce of liquor. *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 330, 84 S.Ct. 1293, 1296, 12 L.Ed.2d 350 (1964). This regulatory authority, however, is not absolute and can be limited by the federal commerce power in appropriate situations. *Id.* at 332, 84 S.Ct. at 1298. *See also California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110, 100 S.Ct. 937, 945, 63 L.Ed.2d 233 (1980) (the states' power to regulate alcoholic beverages advertising is subject to federal anti-trust laws); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 275, 104 S.Ct. 3049, 3057, 82 L.Ed.2d 200 (1984) ("economic protectionism" of local alcoholic beverages violates the Commerce Clause); *Healy v. Beer Inst.*, 491 U.S. 324, 334, 109 S.Ct. 2491, 2498, 105 L.Ed.2d 275 (1989) (state regulation of alcoholic beverage prices is invalid under the Commerce Clause when it affects prices in other states).

Nor does the Twenty-first Amendment necessarily override constitutional guaranties found in the Bill of Rights. In *Craig v. Boren*, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976), Justice Brennan, writing for the majority, stated:

> Once passing beyond consideration of the Commerce Clause, the relevance of the Twenty-first Amendment to other constitutional provisions

> becomes increasingly doubtful. As one commentator has remarked: "Neither the text nor the history of the Twenty-first Amendment suggests that it qualifies individual rights protected by the Bill of Rights and the Fourteenth Amendment where the sale or use of liquor is concerned."

Id. at 206, 97 S.Ct. at 461 (quoting P. Brest, *Processes of Constitutional Decisionmaking, Cases and Materials* 258 (1975)). *See also Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 122 n. 5, 103 S.Ct. 505, 510 n. 5, 74 L.Ed.2d 297 (1982) (state's power under Twenty-first Amendment could not impinge upon Establishment Clause of the First Amendment); *Wisconsin v. Constantineau*, 400 U.S. 433, 436, 91 S.Ct. 507, 509, 27 L.Ed.2d 515 (1971) (posting the names of excessive drinkers in retail liquor outlets violated due process).[9]

The strongest authority for the proposition that the Twenty-first Amendment may alter the balance in the *Central Hudson* analysis can be found in *California v. LaRue*, 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972) and *New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 101 S.Ct. 2599, 69 L.Ed.2d 357 (1981), the cases chiefly relied upon by the Rhode Island Supreme Court in *S & S Liquor* and *Evening Call*.

In *LaRue*, the U.S. Supreme Court upheld a state liquor regulation prohibiting simulated sex acts and the

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[9] For a skillful summary of the historical interplay between the First and Twenty-first Amendments, see Richard S. Mandel, Note, *Liquor Advertising: Resolving the Clash Between The First and Twenty-First Amendments*, 57 N.Y.U.L.Rev. 157 (1984).

showing of films and pictures depicting such acts in licensed clubs. In *Bellanca,* the Court relied heavily upon *LaRue* in upholding a state liquor regulation prohibiting topless dancing in licensed establishments. In both cases, however, expression was only incidentally burdened. The *LaRue* Court was concerned with the conduct rather than the communication:

> [A]s the mode of expression moves from the printed page to the commission of public acts that may themselves violate valid penal statutes, the scope of permissible state regulations significantly increases. States may sometimes proscribe expression that is directed to the accomplishment of an end that the State has declared to be illegal when such expression consists, in part, of "conduct" or "action."

409 U.S. at 117, 93 S.Ct. at 396 (citations omitted).

In the present action, we are not concerned with conduct or "public acts" that violate "valid penal statutes," but rather with pure speech that occurs off the licensed premises. *LaRue* and *Bellanca* do not mandate the application of a deferential standard of review in every case wherein a state, in the exercise of its Twenty-first Amendment powers, impinges on the First Amendment.

Nor do I believe that *Queensgate Invest. Co. v. Liquor Control Com.,* 459 U.S. 807, 103 S.Ct. 31, 74 L.Ed.2d 45 (1982), the only decision of the U.S. Supreme Court to address the relationship between the Twenty-first Amendment and commercial speech doctrine, compels a different result. In *Queensgate,* the Supreme Court summarily dismissed for want of a substantial federal question an appeal of an Ohio Supreme Court decision

upholding the constitutionality of a statute imposing a partial ban on liquor price advertising. Since *Queensgate* relied upon a different factual predicate and, as a summary dismissal lacks a reasoned opinion, I cannot accept it as any stronger authority for the defendant than *LaRue* or *Bellanca*. *See Mandel v. Bradley*, 432 U.S. 173, 176, 97 S.Ct. 2238, 2240, 53 L.Ed.2d 199 (1977) (summary dispositions are binding precedent only on "the precise issues presented and necessarily decided").[10]

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[10] I note that the Supreme Court cited *Queensgate* in its most recent commercial speech opinion, *U.S. v. Edge Broadcasting*, *supra*. In that case, the Supreme Court cited *Queensgate* in support of the narrow proposition that a legislative body is entitled to determine that promotional advertising of a product (lottery gambling) prohibited in one state, but available in a neighboring state, undermines the prohibiting state's policy against gambling, even if the prohibiting state's advertising audience is not "wholly unaware of the lottery's existence" in the neighboring state. ___ U.S. at ___, 113 S.Ct. at 2696. Importantly, the Court went on to note that "[i]f there is an immediate connection between advertising and demand, and the . . . regulation decreases advertising, it stands to reason that the policy of decreasing demand for [the product] is correspondingly advanced." *Id.*

In the liquor advertising context, the above reasoning supports the notion that it "stands to reason" that a state regulation decreasing the amount of alcohol advertising, would directly advance the state's interest in decreasing demand for alcohol. As noted above, however, the regulations at issue in this case make no attempt to reduce the amount of alcohol advertising, but merely proscribe the dissemination of truthful price information. Again, I make no determination here as to the potential constitutionality of a total or partial ban on alcohol advertising in Rhode Island.

Other circuits, relying on *LaRue*, *Bellanca* and *Queensgate*, have applied a deferential *Central Hudson* standard and upheld statutes prohibiting liquor advertising against First Amendment challenges. *See Oklahoma Telecasters Ass'n v. Crisp*, 699 F.2d 490 (10th Cir.1983), *rev'd on other grounds sub nom. Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 104 S.Ct. 2694, 81 L.Ed.2d 580 (1984)[11] and *Dunagin v. Oxford*, 718 F.2d 738 (5th Cir.1983) (en banc), *cert. denied*, 467 U.S. 1259, 104 S.Ct. 3553, 82 L.Ed.2d 855 (1984). I do not find these cases persuasive in the present context. In addition to their reliance on *LaRue* and *Bellanca* to give an "added presumption" of constitutionality to state regulation of pure commercial speech pursuant to the Twenty-first Amendment, these cases concerned total bans on liquor advertising. They simply do not deal with price advertising in the present factual setting.

In sum, I find that the Twenty-first Amendment does not require a modification of either the level or allocation of the burden of proof in commercial speech cases involving the regulation of the sale of alcoholic beverages. *See*

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[11] The Tenth Circuit upheld Oklahoma's ban on alcohol advertising in *Oklahoma Telecasters Association, supra.* The Supreme Court granted *certiorari* to consider the petitioner's claim that the ban was not a valid restriction on commercial speech. Ultimately, however, the Court decided the case on a ground raised by the Federal Communications Commission as *Amicus Curiae*, holding that the Oklahoma ban on the retransmission of liquor advertisements in out-of-state signals by cable operators was preempted by federal regulation of cable broadcasting. *See Capital Cities Cable, Inc. v. Crisp*, 467 U.S. at 697, 104 S.Ct. at 2699. The Supreme Court never reached the First Amendment commercial speech issues.

Michigan Beer & Wine Wholesalers Ass'n v. Attorney General, 142 Mich.App. 294, 370 N.W.2d 328, 335 (1985), *cert. denied*, 479 U.S. 939, 107 S.Ct. 420, 93 L.Ed.2d 371 (1986) (Twenty-first Amendment does not require court to treat restraints on speech any differently than if alcoholic beverages were not involved).[12] Consequently, the State bears the burden of justifying the alcohol price advertising ban by demonstrating that it "directly advances" its interest in promoting temperance and "is not more extensive than is necessary to serve that interest." *Central Hudson*, 447 U.S. at 566, 100 S.Ct. at 2351.

C. Applying the *Central Hudson* Test

As noted above, the parties agree that plaintiffs' proposed speech concerns lawful activity and would not be misleading. They also agree that the State has a substantial interest in promoting temperance. Thus, I need only consider the last two prongs of the *Central Hudson* analysis. The Supreme Court has described these steps as " 'basically involv[ing] a consideration of the 'fit' between the legislature's ends and the means chosen to accomplish those ends.' " *Edge Broadcasting*, ___ U.S. at ___, 113 S.Ct. at 2704 (quoting *Posodas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 341, 106 S.Ct. 2968, 2977, 92 L.Ed.2d 266 (1986)). There must be

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[12] The Michigan intermediate state court, faced with a substantially similar prohibition on alcohol price advertising, applied *Central Hudson* and concluded that the prohibition was an unconstitutional restriction on commercial speech.

an "immediate connection," however, between the prohibition and the government's asserted end. *Central Hudson*, 447 U.S. at 569, 100 S.Ct. at 2353; *Edge Broadcasting*, ___ U.S. at ___, 113 S.Ct. at 2707. And if the means-end connection is "tenuous" or "highly speculative," the regulation cannot survive constitutional scrutiny. *Central Hudson*, 447 U.S. at 569, 100 S.Ct. at 2353.

Unlike a number of cases in the commercial speech area, the link between alcohol price advertising and increased per-capita consumption is not self-evidence. *See, e.g., Posadas*, 478 U.S. at 341-42. 106 S.Ct. at 2976-77 (link between ban on gambling advertising and level of gambling self-evident); *Central Hudson*, 447 U.S. at 569, 100 S.Ct. at 2353 (link between advertising ban and sales self-evident); *Dunagin v. Oxford*, 718 F.2d at 747-49 & n. 8 (link between overall advertising and increased alcohol use deemed self-evident). Nor do I believe this is a case where this Court should defer to the legislature on the basis of precedent which has already established that the legislature's chosen means directly advances the asserted ends. *See, e.g., Metromedia, Inc. v. San Diego*, 453 U.S. 490, 509 & n. 14, 101 S.Ct. 2882, 2893 & n. 14, 69 L.Ed.2d 800 (1981) (plurality relied on established line of cases to ratify legislature's judgment that banning commercial billboards would improve traffic safety).[13]

In this case, the State has failed to carry its burden of proof to show a direct correlation between the price advertising ban and reduced consumption of alcohol. As

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[13] For the reasons discussed *supra* Part III, I do not rely on the Rhode Island Supreme Court's deference to the legislature in *S & S Liquor Mart* and *Evening Call*.

discussed *supra* Part II, the plaintiffs' expert testimony demonstrates that the alcohol price advertising ban has no appreciable impact on levels of consumption in Rhode Island. At best, price advertising is one factor among many that influence alcohol consumption patterns.

Even if defendant's burden of proof on this issue were tempered somewhat by the State's substantial Twenty-first Amendment interest in regulating the evils incident to the sale and transportation of alcohol, the evidence presented does not satisfy the *Central Hudson* test. The State has simply not shown an "immediate connection" between the price advertising ban and reduced consumption.

I also find that the price advertising ban is more extensive than necessary to serve the State's asserted interest. The defendant claims that the ban increases the "search costs" of consumers and reduces the incidence of "price wars" between retailers, thus providing an "artificial floor" for liquor prices. Common sense tells us that a lifting of the ban on price advertising will lead to a more competitive market. But any concern that such competition will result in unacceptably low liquor price levels can be controlled by the imposition of higher sales taxes or minimum consumer prices. Such measures would directly serve the State's asserted ends without burdening commercial speech.

In his concurring opinion in *Central Hudson*, Justice Blackmun emphasized the critical role of an informed public in scrutinizing governmental policy choices:

> I seriously doubt whether suppression of information concerning the availability and price of a

> legally offered product is ever a permissible way for the State to "dampen" demand for or use of the product. Even though "commercial" speech is involved, such a regulatory measure strikes at the heart of the First Amendment. This is because it is a covert attempt by the State to manipulate the choices of its citizens, not by persuasion or direct regulation, but by depriving the public of the information needed to make a free choice.

447 U.S. at 574-75, 100 S.Ct. at 2356.

In this case, the State has failed to demonstrate the necessary reasonable 'fit' between its policy objectives and its chosen means. While it may have been "reasonable" or "rational," as defendant argues, for the legislature to assume a correlation between the price advertising ban and reduced consumption, the Supreme Court has recently explained that such "rational basis" scrutiny is not to be applied when deciding the constitutionality of restrictions on commercial speech:

> [W]hile we have rejected the "least-restrictive-means" test for judging restrictions on commercial speech, so too have we rejected mere rational basis review. A regulation need not be "absolutely the least severe that will achieve the desired end," *Fox, supra,* 492 U.S., at 480, 109 S.Ct., at 3035, but if there are numerous and obvious less-burdensome alternatives to the restriction on commercial speech, that is certainly a relevant consideration in determining whether the "fit" between ends and means is reasonable.

Cincinnati v. Discovery Network, Inc., ___ U.S. ___, ___ n. 13, 113 S.Ct. 1505, 1510 n. 13, 123 L.Ed.2d 99 (1993). Here,

it is evident that the State's ends may be easily accomplished by direct regulations controlling the retail prices of alcoholic beverages.

V. CONCLUSION

Commercial speech enjoys somewhat less First Amendment protection from governmental encroachment than other forms of speech. Nevertheless, under *Central Hudson*, a state must justify restrictions on truthful, nonmisleading commercial speech by demonstrating that its actions "directly advance" a substantial state interest and are no more extensive than necessary to serve that interest.

For the reasons stated above, I hold that §§ 3-8-7 and 3-8-8.1 of the Rhode Island General Laws and Regulation 32 of the Rhode Island Liquor Control Administration do not directly advance the State's interest in reducing overall consumption of alcohol in Rhode Island and are more extensive than necessary to serve the State's interest. I find that the statutes impermissibly restrict commercial speech and are unconstitutional.

SO ORDERED.

Constitutional Addendum

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT XXI

§ 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Statutory Addendum

R.I.G.L. §3-8-7 controls price advertising by licensees.

> No manufacturer, wholesaler, or shipper from without this state and *no holder of a license issued under the provisions of this title and chapter shall cause or permit the advertising in any manner whatsoever of the price of any malt beverage, cordials, wine or distilled liquor offered for sale in this state;* provided, however, that the provisions of this section shall not apply to price signs or tags attached to or placed on merchandise for sale within the licensed premises in accordance with rules and regulations of the department [emphasis added].

R.I.G.L. §3-8-8.1 controls the acceptance of price advertising by the communications media.

No newspaper, periodical, radio or television broadcaster or broadcasting company or any other person, firm or corporation with a principal place of business in the state of Rhode Island which is engaged in the business of advertising or selling advertising time or space shall accept, publish, or broadcast any advertisement in this state of the price or make reference to the price of any alcoholic beverages. Any person who shall violate any of the provisions of this section shall be guilty of a misdemeanor and shall be punished for the first offense by a fine in the sum of fifty dollars ($50.00) and for each additional offense thereafter by a fine not exceeding the sum of one hundred dollars ($100). Publication or broadcast by any person in violation of the provisions of this section shall also be subject to injunctive proceedings in a court of competent jurisdiction on a complaint brought by a retail licensee, or an association of retail licensees.

The provisions of this section shall not apply to any trade journal which is duly recognized and authorized to be exempt from the provisions of this section by the liquor control administrator [emphasis added].

R.I.G.L. §3-8-8 is the statutory basis for the authority of the liquor control administrator to promulgate regulations.

The liquor control administrator is hereby authorized to promulgate rules which will enforce the provisions of §3-8-7 and he shall have the power to suspend the license of any license-holder in violation thereof.

Regulation 32 of the Liquor Control Administrator was enacted to "enforce" the provisions of §3-8-7.

> No placard or sign of any kind which is visible from the exterior of any Class A premises licensed to sell at retail shall make reference to the price of any alcoholic beverage or mixture of alcoholic beverages.

FILED
FEB 23 1995
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No. 94-1140

In The

Supreme Court of the United States

October Term, 1994

44 LIQUORMART, INC. and PEOPLES SUPER LIQUOR STORES, INC.,

Petitioners,

v.

STATE OF RHODE ISLAND, and RHODE ISLAND LIQUOR STORES ASSOCIATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF IN OPPOSITION OF RESPONDENT RHODE ISLAND LIQUOR STORES ASSOCIATION

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TABLE OF CONTENTS

Page

Table of Authorities iii

Statement of the Case 1

Summary of Argument 4

Reasons for Denying the Writ 6

I. There is no split of authorities between the circuits or between the states to warrant the issuance of a writ of *certiorari*..... 6

A. There is no meaningful split of authority between the Circuit Courts of Appeal..... 6

B. There is no split of authority between the states sufficient to invoke this Court's jurisdiction..... 10

II. The court of appeals correctly held that the district court misapplied the *Central Hudson* test..... 11

A. The statutes under review directly advance the state's interest in promoting temperance..... 12

B. The statutes under review are no more extensive than necessary to serve the state's interest in promoting temperance..... 23

III. The Twenty-first Amendment's interaction with other constitutional guarantees and statutory mandates does not dictate its relationship to commercial speech..... 25

TABLE OF CONTENTS – Continued

Page

IV. Rhode Island's ban on alcohol-price advertising is constitutionally applicable to out-of-state retailers..... 27

Conclusion 30

TABLE OF AUTHORITIES

Page

CASES

44 Liquor Mart, Inc. v. Racine, 829 F. Supp. 543 (D.R.I. 1993), *rev'd sub nom. 44 Liquormart, Inc. v. Rhode Island*, 39 F.3d 5 (1st Cir. 1994) 20, 22, 24

44 Liquormart, Inc. v. State of Rhode Island, 39 F.3d 5 (1st Cir. 1994) ..... *passim*

324 Liquor Corp. v. Duffy, 479 U.S. 335 (1987) 26

Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984) 26, 27, 30

Bigelow v. Virginia, 421 U.S. 809 (1975) 16, 27, 28

Board of Trustees of State Univ. of New York v. Fox, 492 U.S. 469 (1989) 16, 22, 23, 24

Brown-Forman Distillers Corp. v. New York State Liquor Authority, 476 U.S. 573 (1986) 26, 27, 28

Cal-Almond, Inc. v. United States Dept. of Agriculture, 14 F.3d 429 (9th Cir. 1993) 17

California v. LaRue, 409 U.S. 109 (1972) 6, 7, 10

California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980) 26

Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984) 18, 19, 25

Central Hudson Gas and Electric Corp. v. Public Service Comm'n of New York, 447 U.S. 557 (1980) .. *passim*

City of Cincinnati v. Discovery Network, Inc., ___ U.S. ___, 113 S.Ct. 1505 (1993) 19, 24

Craig v. Boren, 429 U.S. 190 (1976) 26

TABLE OF AUTHORITIES – Continued

Page

Department of Revenue v. James B. Beam Distilling Co., 377 U.S. 341 (1964) 25

Dunagin v. City of Oxford, Mississippi, 718 F.2d 738 (5th Cir. 1983) (*en banc*), *cert. denied*, 467 U.S. 1259 (1984) 6, 8, 9

Edenfield v. Fane, ___ U.S. ___, 113 S.Ct. 1792 (1993) 12, 13, 19

Healy v. The Beer Institute, 491 U.S. 324 (1989) 26, 27

Ibanez v. Florida Dept. of Business and Professional Regulation, ___ U.S. ___, 114 S.Ct. 2084 (1994) 13

Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982) 26

Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981) 7, 9

Michigan Beer & Wine Wholesalers Ass'n v. Attorney General, 370 N.W.2d 328 (Mich. Ct. App. 1985) 10

New York State Liquor Authority v. Bellanca, 452 U.S. 714 (1981) 6, 7

Oklahoma Telecasters Ass'n v. Crisp, 699 F.2d 490 (10th Cir. 1983), *rev'd on other grounds sub nom. Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984) 6, 9

Pennsylvania State Police v. Hospitality Investments of Philadelphia, Inc., 650 A.2d 854 (Pa. 1994) 11

Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico, 478 U.S. 328 (1986) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Queensgate Investment Co. v. Liquor Control Commission, 69 Ohio St.2d 361, 433 N.E.2d 138 (1982), *appeal dismissed for want of a substantial federal question*, 459 U.S. 807 (1982) 7, 9, 10, 11

Rhode Island Liquor Store Association v. Evening Call Publishing Co., 497 A.2d 331 (R.I. 1985) 11

S & S Liquor Mart, Inc. v. Pastore, 497 A.2d 729 (1985) 11

South Dakota v. Dole, 483 U.S. 203 (1987) 26

United States v. Edge Broadcasting Company, ___ U.S. ___, 113 S.Ct. 2696 (1993) ..... *passim*

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) 17

Wisconsin v. Constantineau, 400 U.S. 433 (1971) 25

STATUTES AND RULES

Sup. Ct. R. 10.1(a) 11

Sup. Ct. R. 10.1(b) 10, 11

Federal Rule of Evidence 803(8) 21

Federal Rule of Evidence 803(18) 21

Rhode Island General Laws § 3-8-7 1

Rhode Island General Laws § 3-8-8.1 ..... 2, 27

STATEMENT OF THE CASE

Claiming that splits exist both between the circuits and among various states, petitioners 44 Liquormart, Inc. and Peoples Super Liquor Stores, Inc. (Liquormart, Peoples, petitioners) have asked that this Court review and "correct" a decision of the United States Court of Appeals for the First Circuit reversing a decision of the United States District Court for the District of Rhode Island. Relying primarily on the four-prong balancing test set forth in *Central Hudson Gas and Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557 (1980), petitioners assert that two Rhode Island statutes violate their First Amendment right to free commercial speech. Respondent Rhode Island Liquor Stores Association (RILSA), on the other hand, contends that the court of appeals correctly held that there was no violation of petitioners' constitutional guarantees particularly when the Twenty-first Amendment to the United States Constitution is added to the balance.

After a hearing on December 17, 1991, the Rhode Island Liquor Control Administrator found that Liquormart had violated the provisions of R.I. Gen. Laws § 3-8-7. Appendix (A.)[1] 48. She imposed a $400 fine which Liquormart paid; Liquormart did not take an administrative appeal. A. 20-21.

Peoples owns several liquor stores in Massachusetts. It was interested in advertising liquor prices in Rhode Island media outlets to attract Rhode Island purchasers to

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[1] All citations to the appendix refer to the appendix to the petition for a writ of certiorari.

its Massachusetts stores but was prevented from doing so by the provisions of R.I. Gen. Laws § 3-8-8.1. A. 49.

On February 28, 1992, Liquormart and Peoples filed this action against the State. RILSA's motion to intervene as a defendant was granted. The trial was conducted on March 11, 1993. The parties stipulated to a number of facts, including that "the state of Rhode Island has a substantial interest in regulating the sale of alcoholic beverages." A. 22. The record of the trial consists of the transcript of the deposition testimony of one expert and the presentations of the parties, augmented by the depositions of two additional experts. *Id.*

In his Memorandum and Order, first noting the "pronounced lack of unanimity among researchers who have studied the effects of alcohol advertising," A. 22, the judge reviewed the testimony presented. He observed that the experts presented by the plaintiffs "maintained * * * that there is no empirical evidence that the presence or absence of alcohol price advertising significantly affects levels of alcohol consumption." A. 23.

The judge required the State to bear the burden of justifying the alcohol-price advertising ban. He rejected the argument that the Twenty-first Amendment adds a presumption of validity to the state statutes and, thus, shifts the burden of proof to the party challenging its constitutionality. A. 42-43. The court held: "I find as a fact that Rhode Island's off-premises liquor price-advertising ban has no significant impact on levels of alcohol consumption in Rhode Island." A. 31. Based on that factual

conclusion, the judge found that the statutes are unconstitutional because they impermissibly restrict commercial speech. A. 47.

RILSA and the State of Rhode Island each appealed that decision to the court of appeals. The appeal was argued on February 10, 1994. On May 2, 1994, the court issued the first of its three opinions. The trial court's decision was reversed in part and sustained in part: the statutes were held to be constitutional insofar as Rhode Island merchants are affected but unconstitutional as applied to Massachusetts merchants. In reaching its decision the court applied the *Central Hudson* test:

> At the outset, we must determine whether the expression is protected by the First Amendment. [I] For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. [II] Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine [III] whether the regulation directly advances the governmental interest asserted, and [IV] whether it is not more extensive than is necessary to serve that interest.

44 Liquormart, Inc. v. State of Rhode Island, 39 F.3d 5, 6 (1st Cir. 1994), *quoting Central Hudson*, 447 U.S. at 566, A. 4.

All parties petitioned for a rehearing and suggested a rehearing *en banc*. Those petitions were denied on July 8, 1994. On that same date, the court's May 2 judgment was vacated, the opinion withdrawn, and a second opinion

was substituted.[2] The result reached in the second opinion was the same as that of the first decision although the reasoning regarding Massachusetts merchants differed. The court specifically provided that the parties could file petitions for rehearings with suggestions for rehearing *en banc* by July 22, 1994. All parties took advantage of that opportunity.

Liquormart and Peoples' petition was denied on July 29, 1994. On October 24, the petitions filed by RILSA and the state were granted, the July 8 opinion was withdrawn, and the judgment of that date was vacated. In its place a third opinion was issued and judgment was entered for RILSA and the state. On reconsideration, the court found that petitioners had waived the issue of the relationship between the Commerce Clause and the Twenty-first Amendment by failing to brief it on appeal. A. 11-12. Thus, the court held that, without the Commerce Clause, Peoples could not prevail on its claim. Therefore, the District Court's decision was reversed.

SUMMARY OF ARGUMENT

Respondent Rhode Island Liquor Stores Association respectfully urges that the petition for a writ of *certiorari* be denied. There are four discrete issues raised by the petition, which taken either individually or all together, are insufficiently compelling for this Court's attention.

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[2] This second opinion was designated "not for publication."

First, contrary to petitioners' spirited attempt to demonstrate otherwise, there is no significant split of authority between the United States courts of appeal. Also there is no reviewable split amongst the states. Finally, there is no split between the courts of appeal and the decisions of the highest state courts.

Second, petitioners' contention that the court of appeals incorrectly applied the last two prongs of the *Central Hudson* test is flawed. There are two lines of commercial-speech cases issuing from this Court. Petitioners depend entirely on the cases regarding the advertising of professional services. They disregard the more applicable cases regarding the advertising of "vices." Alcohol has been lumped by this Court with cigarettes, prostitution, and gambling – all vices. Thus, the cases upholding restrictions on advertising of gambling are highly relevant to the issue of alcohol advertising.

Third, the litany of cases in which this Court has found that the Twenty-first Amendment does not prevail over other constitutional clauses is not persuasive on the issue of the interaction between the Twenty-first Amendment and the First Amendment. That is particularly true given the limits to First Amendment protection of commercial speech.

Fourth, Petitioners waived the Commerce Clause issue in the court of appeals. The ban on liquor-price advertising within Rhode Island is binding on out-of-state entities advertising in Rhode Island. In applying its laws equally to in-state retailers and to out-of-state retailers, Rhode Island has not engaged in economic protectionism in violation of the Commerce Clause.

REASONS FOR DENYING THE WRIT

I. There is no split of authorities between the circuits or between the states to warrant the issuance of a writ of *certiorari*.

Petitioners maintain that there is a conflict between decisions issued by the Court of Appeals for the First Circuit in this case, that of the Fifth Circuit in *Dunagin v. City of Oxford, Mississippi*, 718 F.2d 738 (5th Cir. 1983) (*en banc*), *cert. denied*, 467 U.S. 1259 (1984), and that of the Tenth Circuit in *Oklahoma Telecasters Ass'n v. Crisp*, 699 F.2d 490 (10th Cir. 1983), *rev'd on other grounds sub nom. Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984). Furthermore, they believe that there is a split between decisions of courts from individual states. These perceived conflicts are more apparent than real.

A. There is no meaningful split of authority between the Circuit Courts of Appeal.

In *Dunagin*, the Court of Appeals for the Fifth Circuit was faced with a split of opinion between two district court decisions regarding the constitutionality of Mississippi's restrictions on liquor advertising. Consequently the court comprehensively reviewed the full range of commercial-speech First Amendment protections and exceptions. After first exploring the scope of the protection, the court considered the effect of the Twenty-first Amendment. Particularly, the decisions in *California v. LaRue*, 409 U.S. 109 (1972), and *New York State Liquor Authority v. Bellanca*, 452 U.S. 714 (1981), were examined for this Court's perception of the effect of the Twenty-first

Amendment on protected speech. In *dicta* the court mused:

> *LaRue* and *Bellanca* are cases where fully protected speech was constitutionally restricted because the restriction was incidental to the rational regulation of liquor. It may follow that because any restriction on the advertisement of liquor itself is necessarily related, rationally and directly, to liquor regulation, restrictions placed upon that advertisement by the states are consistent with the First Amendment.

718 F.2d at 745.

The court ultimately based its decision on its application of the *Central Hudson* test to the facts before it. 718 F.2d at 736. Thus, it held that liquor advertising should be treated as protected commercial speech to satisfy the first prong. It found that Mississippi had a substantial interest satisfying the second prong. 718 F.2d at 747. As to the third, it held that "sufficient reason exists to believe that advertising and consumption are linked to justify the ban." At that point, the court noted that "the added presumption of validity required by *LaRue*, *Bellanca* and *Queensgate* [*Investment Co. v. Liquor Control Commission*, 69 Ohio St.2d 361, 433 N.E.2d 138 (1982), *appeal dismissed for want of a substantial federal question*, 459 U.S. 807 (1982)] helps to establish the balance in favor of the state, if balancing be necessary." 718 F.2d at 750. As to the fourth prong, the court again paid lip service to *LaRue*, *Bellanca*, and *Queensgate* but quoted and relied on *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981) (plurality decision), which has no Twenty-first Amendment component. Thus, the alcohol-advertising limitation was found to be

no broader than necessary to meet the state's interest in protecting the health, safety and welfare of its citizens. *Dunagin*, 718 F.2d at 751. Although the *Dunagin* Court considered the effect of the Twenty-first Amendment on alcohol advertising, it ultimately based its decision firmly on the *Central Hudson* analysis. Therefore, the Twenty-first Amendment evaluation is totally tangential to the holding of the case. That being so, the special concurrence, questioning the effect of the amendment, does not have the impact assigned to it by the petitioners.

Even accepting petitioners' contention that the concurring judges in *Dunagin*, added to the dissenting judges, rejected the influence of the Twenty-first Amendment on alcohol-advertising provisions, later opinions of this Court have addressed their concerns. The concurrence opined:

> A conclusion that the Twenty-first Amendment justifies greater intrusions upon the constitutional liberties of individual citizens than would otherwise be the case is an insidious doctrine because it holds that the Constitution places liquor in a totally unique position different from even dangerous drugs and other vice-prone products or occupations.

718 F.2d at 754. *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico*, 478 U.S. 328 (1986), and *United States v. Edge Broadcasting Company*, ___ U.S. ___, 113 S.Ct. 2696 (1993), have each upheld restrictions on advertising of another vice: gambling. "Within the bounds of the general protection provided by the Constitution to commercial speech, we allow room for legislative judgments."

Edge, 113 S.Ct. at 2707. Legislative judgments made pursuant to the Twenty-first Amendment are entitled to room as are those regarding other vices. In the commercial-speech arena, liquor does not hold a unique position after *Posadas de Puerto Rico* and *Edge*. The judges concurring in *Dunagin* in 1983 have been subsequently undercut by those decisions.

Oklahoma Telecasters is in agreement with *Dunagin*. There the court believed that this Court's dismissal of the appeal in *Queensgate* for want of a substantial federal question was dispositive of the alcohol-advertising issue. *Oklahoma Telecasters*, 699 F.2d at 497. Acknowledging that an independent examination of the merits of the case was nevertheless appropriate, the court applied the *Central Hudson* standard. The court recognized that "Oklahoma's alcoholic beverage advertising prohibitions are an exercise of authority within that granted by the Twenty-first Amendment." 699 F.2d at 498. However, "[t]he Twenty-first Amendment did not grant to the states the authority to abrogate individual rights guaranteed by the Fourteenth Amendment." *Id.* As did the *Dunagin* Court, the *Oklahoma Telecasters* Court relied on *Metromedia* as a guide to its *Central Hudson* analysis. Inasmuch as all four criteria were found to have been met, the alcohol-advertising provisions were held to be constitutional. The effect of the Twenty-first Amendment was to add another element to the *Central Hudson* balancing test causing a shift in the state's favor. 699 F.2d at 502.

The First Circuit decision in *44 Liquormart* is in substantial agreement with *Oklahoma Telecasters*. Here the court of appeals also undertook a *Central Hudson* review of the facts before it. That review is surveyed in Section II

below. The court found that the statutes met the *Central Hudson* standard. *44 Liquormart*, 39 F.3d at 7-8, A. 7-8. "In addition, the presumption based upon the Twenty-first Amendment, *LaRue, supra,* seems precisely in order." 39 F.3d at 8, A. 8.

The three courts of appeals which have explored the relationship of the Twenty-first Amendment to the First Amendment are in general agreement. Each has considered the precedential value of the denial of the *Queensgate* appeal. Each has considered the effect of this Court's decision in *LaRue*. Each has acknowledged that the Twenty-first Amendment has a bearing on the issue. Each has done an independent *Central Hudson* analysis of the facts before it. Finally, each has upheld the constitutionality of the alcohol-advertising provisions enacted by the states. There is no meaningful split of authority between the Circuit Courts of Appeal and, therefore, the petition should be denied.

B. There is no split of authority between the states sufficient to invoke this Court's jurisdiction.

Rule 10.1(b) of the Supreme Court Rules provides that review on writ of *certiorari* may be granted "[w]hen a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals." In arguing that the state courts are divided petitioners rely on the decision in *Michigan Beer & Wine Wholesalers Ass'n v. Attorney General*, 370 N.W.2d 328 (Mich. Ct. App. 1985). That is the only state court decision cited which has failed to uphold alcohol-price advertising restrictions.

The problem here is evident: the Michigan Court of Appeals is not a state court of last resort. The Michigan Supreme Court has not addressed the issue. The other state decisions to which petitioners advert have upheld their statutes: *Queensgate; Pennsylvania State Police v. Hospitality Investments of Philadelphia, Inc.*, 650 A.2d 854 (Pa. 1994);[3] *Rhode Island Liquor Store Association v. Evening Call Publishing Co.*, 497 A.2d 331 (R.I. 1985); *S & S Liquor Mart, Inc. v. Pastore*, 497 A.2d 729 (1985).

Rule 10.1(a) of the Supreme Court Rules is of no more usefulness to petitioners than is Rule 10.1(b). Rule 10.1(a) provides that jurisdiction will lie "[w]hen a United States court of appeals * * * has decided a federal question in a way in conflict with a state court of last resort * * * ." In this instance the Courts of Appeals for the First, Fifth and Tenth Circuits as well as the highest courts of the states of Ohio, Pennsylvania and Rhode Island are in agreement: statutes restricting alcohol advertisements enacted under the authority of the Twenty-first Amendment are constitutionally valid. There is no split among the various jurisdictions of sufficient importance to warrant this Court's review.

II. The court of appeals correctly held that the district court misapplied the *Central Hudson* test.

In upholding the validity of the Rhode Island statutes pertaining to alcohol-price advertising, the court panel

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[3] A petition for *certiorari* has been filed in this Court, No. 94-1247, in *Hospitality Investments*. *See* Brief of Amicus Curiæ, Association of National Advertisers, Inc., filed in support of the petition in the instant case.

applied the *Central Hudson* test to the facts before it. Finding no need to consider the first two prongs, since there was no question presented by the first and the state's interest was stipulated, the court focused on the third and fourth issues. Petitioners assert that the court incorrectly resolved those questions. However, when the issues are viewed in the light of a spectrum of this Court's commercial-speech decisions, the court of appeals' opinion is clearly correct.

A. The statutes under review directly advance the state's interest in promoting temperance.

The court of appeals, first noting that the burden of proof is on the party seeking suppression, determined that the district court had applied too strict a test. In deciding whether a statute directly advances the state's interest, "[i]t is not correctness, it is reasonableness." *44 Liquormart*, 39 F.3d at 7, A. 5. The court looked to a wider range of this Court's cases than do petitioners. Thus, it recognized that the *Central Hudson* phrase "directly advances" is not absolute. *Id.*

In support of that recognition, the court cited *Edenfield v. Fane*, ___ U.S. ___, 113 S.Ct. 1792 (1993), which addressed the question whether a certified public accountant has a protected First Amendment right to solicit business personally. Florida law prevented that practice. This Court observed:

> [L]aws restricting commercial speech, unlike laws burdening other forms of protected expression, need only be tailored in a reasonable manner in order to survive First Amendment scrutiny.

113 S.Ct. at 1798. Applying "this intermediate standard of review," the Court found that the regulation of Certified Public Accountants by the State of Florida was unduly burdensome on First Amendment rights. Basically, in *Edenfield* the fit between the stated interests and the regulation was found to be missing even under a "reasonable manner" standard.

Petitioners rely on both *Edenfield* and *Ibanez v. Florida Dept. of Business and Professional Regulation*, ___ U.S. ___, 114 S.Ct. 2084 (1994), a similar case concerning the advertising of professional qualifications by a lawyer who was also a CPA. They insist that the Florida cases define the standard for measuring "directly advance" in this case. What they fail to take into account is that there is a difference in the standard when this Court speaks of advertising of professional services and when it considers advertising of "vices." At least two lines of cases have emerged in commercial-speech cases: one concerned with an individual's right to market his or her profession and the other addressing the state's right to protect the health, safety and welfare of its citizens from various vices. *Edge* characterized vice activities as those that "[can] be, and frequently [have] been, banned altogether." 113 S.Ct. at 2703. Adopting that characterization, the control of alcohol qualifies as the regulation of a vice. In fact, this Court has specifically categorized alcohol with cigarettes, gambling and prostitution. *Posadas de Puerto Rico*, 478 U.S. at 346. *Posadas de Puerto Rico* and *Edge* typify the approach taken by this Court when government regulates advertising of vice activities.

Posadas de Puerto Rico examined the constitutionality of a Puerto Rico statute and regulations which prevented

the advertising of casino gambling to Puerto Ricans although advertising to tourists was allowed. The appellants, operators of a hotel and casino, claimed that the statute was violative of the First Amendment's protection of commercial speech, both facially and as applied. This Court applied the *Central Hudson* test. Easily finding that the first two prongs of the test were satisfied, this Court turned to an analysis of the " 'fit' between the legislature's ends and the means chosen to accomplish those ends":

> The Puerto Rico Legislature obviously *believed*, when it enacted the advertising restrictions at issue here, that advertising of casino gambling aimed at the residents of Puerto Rico would serve to increase the demand for the product advertised. *We think the legislature's belief is a reasonable one*, and the fact that appellant has chosen to litigate this case all the way to this Court indicates that appellant shares the legislature's view.

478 U.S. at 341-42 (emphasis added).

Looking to the fourth prong of the test, the *Posadas de Puerto Rico* Court had no difficulty determining that the restriction on casino advertising was no more extensive than necessary to serve the state's interest. The appellant suggested other means by which the state's interest could be effectuated without impinging on its commercial speech. This Court would have none of it, explaining that it is up to the legislature to decide that policy. 478 U.S. at 344.

Posadas de Puerto Rico continues the evolution of the *Central Hudson* test in the area of vice regulation by the states.

> It would * * * surely be a strange constitutional doctrine which would concede to the legislature the authority to totally ban a product or activity, but deny to the legislature the authority to forbid the stimulation of demand for the product or activity through advertising on behalf of those who would profit from such increased demand. Legislative regulation of products or activities deemed harmful, such as cigarettes, alcoholic beverages, and prostitution, has varied from outright prohibition on the one hand * * * to legalization of the product or activity with restrictions on stimulation of its demand on the other hand * * *. To rule out the latter, intermediate kind of response would require more than we find in the First Amendment.

Posadas de Puerto Rico, 478 U.S. at 347-48 (citations omitted).

Edge, like *Posadas de Puerto Rico*, examined whether advertisement of gambling opportunities could be regulated by the government. This Court considered the balancing of interests between lottery and non-lottery states as "the substantial governmental interest that satisfies *Central Hudson*." 113 S.Ct. at 2704. "We made clear in *Fox* that our commercial speech cases require a fit between the restriction and the government interest that is not necessarily perfect, but reasonable. * * * This was also the approach in *Posadas* * * *." 113 S.Ct. at 2705 (citations omitted).

In *Edge* the federal statutory ban on broadcast lottery advertisements in non-lottery states was upheld in the face of a First Amendment challenge. Initially the Court observed:

> [T]he activity underlying the relevant advertising – gambling – implicates no constitutionally protected right; rather, it falls into a category of "vice" activity that could be, and frequently has been, banned altogether.

113 S.Ct. at 2703. Applying the *Central Hudson* test, the fit between the restriction and the government interest was found to be reasonable. This Court, again citing *Board of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469 (1989), noted that the fit need not necessarily be perfect. *Edge*, 113 S.Ct. at 2705. Although the government could have protected its interests in other ways, the regulation was found not to be more extensive than necessary. 113 S.Ct. at 2704-2705.

Bigelow v. Virginia, 421 U.S. 809 (1975), removed any doubts that commercial speech is accorded some level of protection. *Central Hudson* established the test by which regulation of commercial speech is to be measured. However, developments since *Central Hudson* have not altered the secondary status afforded commercial speech in the pantheon of First Amendments rights. Furthermore, as the most recent cases show, particularly *Edge*, even within the commercial-speech category there is a hierarchy of more and less protected areas of speech. Where vice is concerned more leeway is allowed and this Court defers to the judgment of the regulators. Just as there are two levels of First Amendment speech protection, commercial speech being subordinate to noncommercial speech, there

are two levels of commercial-speech protection – vice regulation and professional regulation are afforded different levels of First Amendment protection.

After the decisions in *Posadas de Puerto Rico* and *Edge* there can be no doubt that the *Central Hudson* test is currently considerably less exacting than originally formulated. In fact, this Court has explicitly recognized that "other formulations in our commercial speech cases support a more flexible meaning for the *Central Hudson* test." *Fox*, 492 U.S. at 477. After all, "[t]here are commonsense differences between speech that does 'no more than propose a commercial transaction,' * * * and other varieties." *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 n.24 (1976). Petitioners' failure to acknowledge this second line of cases considerably weakens their claim for this Court's writ.

The court of appeals observed that: "there would seem inherent merit in the State's contention that competitive price advertising would lower prices, and that with lower prices there would be more sales." *44 Liquormart*, 39 F.3d at 7, A. 7. The Court of Appeals for the Ninth Circuit has recognized that: "[t]he Supreme Court assumes as a matter of law that advertising increases consumption of the product or service being advertised." *Cal-Almond, Inc. v. United States Dept. of Agriculture*, 14 F.3d 429, 439 (9th Cir. 1993), *citing Posadas de Puerto Rico* and *Central Hudson*. The state's interest in promoting temperance by decreasing the amount of consumption is, thus, logically advanced by the ban on alcohol-price advertising. The court of appeals commented that: "the State is entitled to a reasonable choice." *44 Liquormart*, 39

F.3d at 7, A. 6. This Court's decisions mandate that result and further guidance on the subject is unnecessary.

Petitioners assert that the state's only interest is in preventing price wars among liquor store retailers. Petition (Pet.) at 18. That is a very narrow and misleading characterization of the state's interest. The general interest is in promoting temperance. The more specific interest, as recognized by the court of appeals, is in not promoting increased purchases of alcoholic beverages. 39 F.3d at 7, A. 7. Petitioners seek to minimize the effect of the advertising ban by proclaiming again and again that: "Rhode Island was in the top 30 percent of the states in per capita consumption with the ban in place!" Pet. at 19. *See also,* Pet. at 7, 20, 21, 23. The emphasis on ranking is misplaced. For all we know, without the ban Rhode Island might rank #1.

Although the Court determined that Oklahoma's ban on advertising wine on cable television programming was preëmpted by federal law, in *Capital Cities Cable, Inc. v. Crisp,* 467 U.S. 691 (1984), Justice Brennan, writing for a unanimous court, observed:

> On the other hand, application of Oklahoma's advertising ban to out-of-state signals carried by cable operators in that State is designed principally to further the State's interest in discouraging consumption of intoxicating liquor. * * * Although the District Court found that "consumption of alcoholic beverages in Oklahoma has increased substantially in the last 20 years despite the ban on advertising of such beverages," * * * *we may nevertheless accept Oklahoma's judgment* that restrictions on liquor advertising represent at least a reasonable, albeit

> limited, means of furthering the goal of promoting temperance in the State.

467 U.S. at 714-715 (emphasis added). The court of appeals properly accepted Rhode Island's judgment. This Court has never required empirical evidence to rebut the policy determinations of state legislatures. Room is allowed for legislative judgment. *Edge*, 113 S.Ct. at 2707.

Petitioners further contend that the measures are underinclusive. Pet. at 19. The argument is that since "Rhode Island does not regulate all, or even any, advertising of alcoholic beverages other than price advertising," there is no "immediate connection" between the state's temperance interest and the price ban. In support of that contention petitioners cite to *Capital Cities Cable, City of Cincinnati v. Discovery Network, Inc.*, ___ U.S. ___, 113 S.Ct. 1505 (1993), and *Edenfield*.

In *Capital Cities Cable* this Court found that Oklahoma's interest in barring television advertisements of wine was of insufficient weight to counter regulations issued by the Federal Communications Commission. 467 U.S. at 700. However, the Court did not dismiss the Oklahoma advertising ban out of hand, but rather found it "reasonable." 467 U.S. at 715. There is no discussion in *Capital Cities Cable* regarding underinclusiveness *per se*. Similarly, *City of Cincinnati* does not specifically discuss the concept of underinclusiveness. The decision there was compelled because the city failed to show the requisite "fit" between its asserted interests and the means chosen to promote those interests. 113 S.Ct. at 1516. "[T]he distinction Cincinnati has drawn has absolutely no bearing on the interests it has asserted * * * ." *Id. Edenfield*, in like

manner, is of no assistance to petitioners both because a profession was the subject of the regulation and because the regulation did not fit the intended purpose.

In *Posadas de Puerto Rico*, as here, the argument was made that, because all advertising was not prohibited, the partial ban was underinclusive. 478 U.S. at 342. This Court rejected that contention, finding that the partial ban directly advanced the government's interest in reducing demand for gambling. *Posadas* appears to compel a rejection of petitioners' underinclusiveness claim.

Petitioners insist that "common sense dictates that if the state's theory is correct, there should be empirical evidence to support it." Pet. at 21. However, the court of appeals pondered a court's reaction when "there is no empirical evidence either way and expert opinions go both ways[.]" 39 F.3d at 7, A. 6. Furthermore, the district court prefaced its findings of fact with: "At the outset, I note a pronounced lack of unanimity among researchers who have studied the effects of alcohol advertising." *44 Liquor Mart, Inc. v. Racine*, 829 F. Supp. 543, 546 (D.R.I. 1993), *rev'd sub nom. 44 Liquormart, Inc. v. Rhode Island*, 39 F.3d 5 (1st Cir. 1994). Thus, rather than being a common sense issue, the price-advertising ban remains a question for legislative judgment.

At trial the petitioners attempted to have the New York State Moreland Commission on the Alcoholic Beverage Control Law, *Report and Recommendations No. 3*, January 21, 1964, introduced as a full exhibit. The state objected arguing that the report was hearsay and had not

been relied on by petitioners' experts. Petitioners contended that the report was admissible under either Federal Rules of Evidence 803(8) or 803(18). The trial judge sustained the state's objection. The report was, thus, not before the trial justice. Nevertheless, petitioners relied on the report in their brief to the court of appeals. Respondents again objected, arguing that the report was not a part of the record. Tenaciously, petitioners again rely on the Moreland Report in their petition to this court. Pet. at 21-22. In footnote 10, Pet. 22, they observe that the report "has been noticed by several courts in ruling on alcoholic beverages related issues." In those cases the report was on the record. That report is not a part of the record in this case and petitioners' reliance on it is entirely misplaced.[4]

Citing *Central Hudson*, petitioners appear to argue that Rhode Island's price-advertising ban is a "blanket ban on commercial speech." Pet. at 24, *quoting Central Hudson*, 447 U.S. at 566, n.9. Nothing could be further from the truth. The ban only extends to advertisement of the prices at which alcoholic beverages are offered for sale. All other advertising of alcoholic beverages is permitted in Rhode Island. National advertising is omnipresent. The Rhode Island legislature may well have believed that the ban on price advertising would lower the overall incidence of alcohol promotions. Generally

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[4] Petitioners at least tried to introduce the Moreland report, which is more than they did with M. J. Waterson, ADVERTISING BRANDS AND MARKETS, (Advertising Ass'n Monograph, 2nd ed. 1985) on which they rely at footnote 11, Pet. 23-24. That report is directed to any court's attention for the first time in this petition.

speaking the available beverages do not vary substantially from retailer to retailer. Thus, the only major difference between one liquor store and another may be the prices at which the alcohol is sold. Without being able to advertise lower prices, merchants may well decide not to advertise at all. To the extent that the ban reduces overall advertising by retailers who believe it is not cost effective, the state's interest in promoting temperance is furthered.

Petitioners insist that the court of appeals impermissibly shifted the burden of proof from the state to prove that its statutes directly advance the government's interest. Pet. 16. They recognize that the court specifically stated that the burden is on the state. 39 F.3d at 7, A. 5. Petitioners nevertheless argue that, because the district court's findings of fact were disregarded, the burden was shifted to them. Pet. 16. The court of appeals in effect found that the district court had exceeded its authority in finding: "Rhode Island's off-premises liquor price advertising ban has no significant impact on levels of alcohol consumption in Rhode Island." *44 Liquor Mart, Inc. v. Racine*, 829 F. Supp. at 549, A. 31. There was "no empirical evidence either way." 39 F.3d at 7, A. 6. Thus, "the State is entitled to a reasonable choice. This includes choice of method – it is not obliged to prove that some other method, e.g., taxation, would be less effective." *Id.* The court of appeals cited *Fox*, 492 U.S. at 478:

> [W]e have not insisted that there be no conceivable alternative, but only that the regulation not "burden substantially more speech than is necessary to further the government's legitimate

> interest," * * * . *And we have been loath to second-guess the Government's judgment to that effect.*

(Citations omitted, emphasis added.) Thus, the court was not shifting the burden but, rather, was following the dictates of this Court.

The court of appeals' opinion follows this Court's precedents in the commercial-speech arena. Petitioners' reliance on cases analyzing commercial speech in the advertising of professional services is unavailing. At issue in this case is advertising that does no more than propose a commercial transaction. Petitioners want to sell more liquor and would like to advertise low prices to do so. The state has an interest in promoting temperance and, thus, does not want to encourage more liquor sales. The price-advertising ban directly advances the state's interest. The test applied by the district court was unnecessarily rigorous as recognized by the court of appeals. Inasmuch as the decision below was correct, this petition for a writ of *certiorari* should be denied.

B. The statutes under review are no more extensive than necessary to serve the state's interest in promoting temperance.

In *Fox* this Court explored the last element of the *Central Hudson* test. Particularly, the meaning of the word "necessary" was canvassed. The Court rejected outright the least-restrictive-means standard. 492 U.S. at 477. Rather:

> What our decisions require is a " 'fit' between the legislature's ends and the means chosen to accomplish those ends," * * * – a fit that is not

> necessarily perfect, but *reasonable*; that represents not necessarily the single best disposition but one whose scope is "in proportion to the interest served;" * * * that employs not necessarily the least restrictive means but, * * * a means tailored to achieve the desired objective. Within those bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed.

492 U.S. at 480 (citations omitted, emphasis added).

Without citing to any specific language so holding, petitioners maintain that the court of appeals adopted a rational-basis test for determining whether the statutes are more extensive than necessary. Reference to the opinion demonstrates that petitioners are just plain wrong: the test applied by the court of appeals was that of "reasonableness." 39 F.3d at 7, A. 5. The standard applied by the district court and rejected by the court of appeals approached a least-restrictive-means test. The trial judge referred to alternatives which the legislature might have chosen. *44 Liquor Mart, Inc. v. Racine*, 829 F. Supp. at 554, A. 45. In this petition there are suggestions of alternatives which might have been chosen by the state. Pet. at 26. The problem with petitioners' argument is that *Fox* teaches differently. Petitioners depend on a footnote from *City of Cincinnati* in their attempt to establish a least-restrictive-means standard without actually denominating it so. 113 S.Ct. at 1510 n.13. However, the subsequent decision in *Edge* validated the *Fox* approach: "not necessarily perfect, but reasonable." *Edge*, 113 S.Ct. at 2705. That is the test appropriately applied by the court of

appeals: the statutes under review pass constitutional muster.[5]

Reasonably viewed the Rhode Island statutes prohibiting alcohol-price advertising, albeit limited, are constitutionally acceptable means of furthering the goal of promoting temperance in the state. *Capital Cities Cable,* 467 U.S. at 715. The court of appeals was entirely in concert with the decisions of this Court in that regard. There is no need for review of the decision below and no necessity for its correction.

III. The Twenty-first Amendment's interaction with other constitutional guarantees and statutory mandates does not dictate its relationship to commercial speech.

Citing to a number of this Court's decisions, petitioners assert that: "[t]he Court has consistently rejected states' attempts to rely upon the Twenty-first Amendment as a justification for abrogating other constitutional provisions." Pet. at 12. Each of those decisions was made on its own merits in the light of its own facts and is not dispositive of the merits in this case. The litany is protracted: *Department of Revenue v. James B. Beam Distilling Co.,* 377 U.S. 341 (1964) (import-export clause); *Wisconsin v. Constantineau,* 400 U.S. 433 (1971) (due process clause);

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[5] Petitioners cite to petitioner's brief to this Court in *Bentsen v. Coors Brewing Company,* No. 93-1631, and to the transcript of the oral argument heard on November 30, 1994. There would appear to be some question as to the precedential value of the case until such time as a reasoned decision has been issued.

Craig v. Boren, 429 U.S. 190 (1976) (equal protection clause); *South Dakota v. Dole*, 483 U.S. 203 (1987) (Congress' spending power); *California Retail Liquor Dealer's Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) (antitrust laws); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984) (economic protectionism); *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573 (1986) (commerce clause); *324 Liquor Corp. v. Duffy*, 479 U.S. 335 (1987) (antitrust laws); *Healy v. The Beer Institute*, 491 U.S. 324 (1989) (commerce clause); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982) (establishment clause). Pet. at 12-13. It is also unavailing.

This Court's decisions in *Posadas de Puerto Rico* and *Edge* have established that First Amendment protection of commercial speech is not sacrosanct. In *Posadas de Puerto Rico* the Court observed that: "the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling." 478 U.S. at 345-46. The authority of the states to totally ban traffic in alcoholic beverages under the Twenty-first Amendment is unquestioned. Following the reasoning of *Posadas de Puerto*, then, the states have the lesser power to ban alcohol advertising. Similarly, in *Edge* the court observed: "the activity underlying the relevant advertising – gambling – implicates no constitutionally protected right; rather it falls into a category of 'vice' activity that could be, and frequently has been, banned altogether." 113 S.Ct. at 2703. Alcohol consumption is not a constitutionally protected right and, contrary to petitioners' contention, there is no "constitutional right to obtain accurate price information about [alcohol]." Pet. at 3. Thus, the First Amendment guarantee to freedom of

speech has its limits when it enters the realm of commercial speech. Decisions of this Court in other constitutional contexts do not exact a finding that restrictions on alcohol advertising are constitutionally infirm.

IV. Rhode Island's ban on alcohol-price advertising is constitutionally applicable to out-of-state retailers.

Petitioners maintain that the price-advertising ban cannot apply to Peoples as an out-of-state entity. "The Twenty-first Amendment does not empower the states to regulate economic activity beyond their borders." Pet. at 27. The point petitioners fail to grasp is that the applicable Rhode Island statute, R.I. Gen. Laws § 3-8-8.1, A. 49, applies only to activity taking place within the circumscribed borders of that state. Furthermore, in support of this argument, petitioners quote *Brown-Forman*, and cite *Healy v. The Beer Institute*, and *Bacchus*. All three of those cases are expositions of the Commerce Clause. The court of appeals specifically found that petitioners had waived the Commerce Clause. 39 F.3d at 9, A. 11-12. Particularly, petitioners' claim of economic protectionism is not before this Court, grounded firmly as that concept is in the Commerce Clause.

Even if these issues were properly raised, there is no merit to petitioners' protestations. Quoting *Bigelow v. Virginia*, 421 U.S. at 824-25 (1975), petitioners emphasize that the state "may not, under the guise of exercising internal police powers, bar a citizen of another State from disseminating information about an activity that is legal in that State." Pet. at 28. *Bigelow*, however, does not require that Rhode Island must allow alcohol-price advertising by out-of-state retailers. Selling alcoholic beverages is legal

in Massachusetts; Rhode Island does not attempt to bar retailers from disseminating information regarding that activity. Nevertheless, *Bigelow* does not go so far as to permit Massachusetts law allowing price advertising to dictate to Rhode Island what its laws must provide. "Advertising, like all public expression may be subject to reasonable regulation that serves a legitimate public interest." 421 U.S. at 825-26. Rhode Island has determined that its temperance interest is served by prohibiting alcohol-price advertising. Such a prohibition is a reasonable regulation and is, thus, legitimate under *Bigelow*. Massachusetts has made a different decision regarding price advertising but its policies cannot be imposed upon a sister state pursuant to any authority derived from *Bigelow*.

Plaintiffs claim that the media alcohol-price advertising ban "concerns the sale of products outside [Rhode Island's] jurisdiction." Pet. at 27. They further imply that Rhode Island is regulating economic activity in Massachusetts. *Brown-Forman*, cited by the petitioners to support their contention, does not aid their cause. In *Brown-Forman* a New York liquor regulation was found to violate the Commerce Clause because it *controlled* prices in other states. 476 U.S. at 583. The Rhode Island measures regarding price advertising have absolutely no impact on what Massachusetts retailers may or may not do in Massachusetts. The statutes do control what a Massachusetts retailer may do in Rhode Island. However, it is entirely within the scope of Rhode Island's police power, even without resort to the Twenty-first Amendment, to regulate within its borders retailers' commercial activities whether those retailers be from Rhode Island, Massachusetts, or any other jurisdiction.

Rhode Island's ban on the advertising of liquor prices in Rhode Island media outlets is a reasonable exercise of its power to regulate alcohol under the Twenty-first Amendment. All other advertising of liquor is allowed. Thus, information regarding brand availability, assortment, and quality may be readily advertised in Rhode Island media sources by both Rhode Island merchants and those from Massachusetts. Rhode Island does not exert any control over what its citizens may buy in Massachusetts. Furthermore, of course, the Rhode Island regulations make no effort to curb Massachusetts price advertising in Massachusetts media outlets. Thus, if a Rhode Island citizen is eager to investigate liquor prices in Massachusetts, there is no dearth of readily available information to be found from Massachusetts sources. Massachusetts newspapers circulate freely throughout Rhode Island. Massachusetts radio stations are heard throughout Rhode Island. Most Rhode Islanders have over-the-air access to Massachusetts television programming. A dealer in Massachusetts may advertise his prices in Massachusetts without regard to any Rhode Island regulation. Indeed, he may advertise his wares in Rhode Island without offending any law or regulation. What he cannot do is to advertise the price of his wares in Rhode Island newspapers, through Rhode Island radio station advertisements or Rhode Island television station commercials. Rhode Island retailers are subject to the exact same strictures. The relationship between Massachusetts and Rhode Island advertisers is the same as that at issue in *Edge* between North Carolina and Virginia advertisers.

In spite of the fact that Massachusetts retailers and Rhode Island retailers are equally subject to the regulations, petitioners assert that the measures amount to

economic protectionism. *Bacchus* teaches: "A finding that state legislation constitutes 'economic protectionism' may be made on the basis of either discriminatory purpose * * * or discriminatory effect." 468 U.S. at 270. Here there is neither. Rhode Island does not discriminate against Massachusetts in its liquor-control statutes – retailers from both states are regulated in like manner. Rhode Island retailers enjoy no preferential benefit by reason of any state enactment. That being the case, there can be no economic protectionism. The claim is without merit and is undeserving of this Court's review.

CONCLUSION

For all of the foregoing reasons, respondent Rhode Island Liquor Stores Association respectfully urges that the petition for a writ of *certiorari* be denied.

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No. 94-1140

FILED
FEB 23 1995
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

44 LIQUORMART, INC. and PEOPLES SUPER LIQUOR STORES, INC.,

Petitioners,

v.

STATE OF RHODE ISLAND, and RHODE ISLAND LIQUOR STORES ASSOCIATION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 4

ARGUMENT 4

I. THE TWENTY-FIRST AMENDMENT SHOULD BE CONSIDERED IN A COMMERCIAL SPEECH CASE INVOLVING THE REGULATION OF ALCOHOLIC BEVERAGES 4

II. THIS COURT'S SUMMARY DISMISSAL OF *QUEENSGATE INVESTMENT COMPANY V. LIQUOR CONTROL COMMISSION* MANDATES REJECTION OF THE INSTANT PETITION 8

III. THE FIRST CIRCUIT WAS CORRECT IN ITS APPLICATION OF THE *CENTRAL HUDSON* TEST TO THE STATUTES AND REGULATION AT ISSUE 12

A. The Advertising Restriction Materially Advances the Asserted Governmental Interest 14

B. The Advertising Restriction Is Narrowly Tailored to Advance the State's Substantial Interest 24

CONCLUSION 29

TABLE OF AUTHORITIES

Page

Adolph Coors v. Brady, (*Coors I*), 944 F.2d 1543 (10th Cir. 1991) 8

Adolph Coors v. Lloyd Bentsen, (*Coors II*), 2 F.3d 355 (10th Cir. 1993) 8

Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984) 26

Bd. of Trustees v. Fox, 492 U.S. 469 (1989) 24, 25, 28

Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485 (1984) 24

Cal-Almond v. U.S.D.A., 14 F.3d 429 (9th Cir. 1993) 20

California v. LaRue, 409 U.S. 109 (1972) 4, 7, 8, 13, 15, 16, 27

California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980) 26

Capital Broadcasting v. Mitchell, 333 F. Supp. 582 (D.D.C. 1971) (three-judge court), *aff'd mem.*, 405 U.S. 1000 (1972) 18, 20, 25

Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984) 26

Cardi Corp. v. State, 524 A.2d 1092 (R.I. 1987) 13

Central Hudson Gas & Electric Corporation v. Public Service Commission of New York, 447 U.S. 557 (1980) ..... *passim*

City of Newport, Ky. v. Iacobucci, 479 U.S. 92, *reh'g denied*, 479 U.S. 1047 (1986) 14, 15

Craig v. Boren, 429 U.S. 190 (1976) 26

Donahue v. Rhode Island Department of Mental Health, Retardation and Hospitals, 632 F. Supp. 1456 (D.R.I. 1986) 13

TABLE OF AUTHORITIES – Continued

Page

Dunagin v. City of Oxford, 718 F.2d 738 (5th Cir. 1983) ..... *passim*

Edenfield v. Fain, ___ U.S. ___, 113 S.Ct. 1792 (1993) 26, 27

Falls City Industries, Inc. v. Vanco Beverage, Inc., 460 U.S. 428 (1983) 17

Friedman v. Rogers, 440 U.S. 1 (1979) 25

44 Liquor Mart, Inc. v. Racine, 829 F. Supp. 543 (D.R.I. 1993) 2, 3

44 Liquor Mart, Inc. v. State of Rhode Island, 39 F.3d 5 (1st Cir. 1994) 4, 5

Garcia v. Arizona State Liquor Board, 21 Ariz. App. 456, 520 P.2d 852 (1974) 15

Giebink v. Fischer, 709 F. Supp. 1012 (D.Colo. 1989) 13

Griswold v. Connecticut, 381 U.S. 479 (1965) 13

Hancock Industries v. Schaffer, 811 F.2d 225 (3rd Cir. 1987) 16

Healy v. The Beer Inst., 491 U.S. 324 (1989) 17

Hicks v. Miranda, 422 U.S. 332 (1975) 11

Hornell Brewing Co., Inc. v. Brady, 819 F. Supp. 1227 (E.D.N.Y. 1993) 17

Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324 (1964) 26

Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982) 7

Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981) 14, 18, 22, 23

TABLE OF AUTHORITIES – Continued

Page

New York State Liquor Authority v. Bellanca, 452 U.S. 714 (1981) 7, 13, 15, 16, 22, 27, 28

Ohralik v. Ohio State Bar Ass'n, 436 U.S. 445, *reh'g denied*, 439 U.S. 883 (1978) 23

Oklahoma v. Burris, 626 P.2d 1316 (Okla. 1980) 16

Oklahoma Telecasters Association v. Crisp, 699 F.2d 490 (10th Cir. 1983) ..... *passim*

Olitsky v. O'Malley, 597 F.2d 295 (1st Cir. 1979) 15, 16, 22

Posadas de Puerto Rico Assoc. v. Tourism Company of Puerto Rico, 478 U.S. 328 (1986) 14, 18, 25, 26, 27, 28

Princess Sea Indus., Inc. v. State, 635 P.2d 281 (Nev. 1981) 18, 25

Queensgate Investment Company v. Liquor Control Commission, 69 Ohio St. 361, 433 N.E.2d 138 (1982), *appeal dismissed*, 459 U.S. 807 (1982) .... *passim*

Rankin v. McPherson, 483 U.S. 378 (1987) 23

Rhode Island Liquor Stores Ass'n v. The Evening Call, 497 A.2d 331 (R.I. 1985) 2, 22, 25

S & S Liquor Mart, Inc. v. Pastore, 497 A.2d 729 (R.I. 1985) 13, 25

Stone v. Mississippi, 101 U.S. 814 (1880) 26

324 Liquor Corp. v. Duffy, 479 U.S. 335 (1987) 26

U.S. v. Edge Broadcasting Co., ___ U.S. ___, 113 S.Ct. 2696 (1993) 25, 26

United Nuclear Corp. v. Cannon, 553 F. Supp. 1220 (D.R.I. 1982) 13

TABLE OF AUTHORITIES – Continued

Page

Williams v. Spencer, 622 F.2d 1200 (4th Cir. 1980)..... 20

Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483 (1955)..... 16

Ziffrin, Inc. v. Reeves, 308 U.S. 132 (1939)..... 27

STATUTES:

15 U.S.C. §§ 1-7..... 2

42 U.S.C. § 1983..... 2

R.I. Gen. Laws § 3-1-5..... 1, 18, 24

R.I. Gen. Laws § 3-8-7..... 1, 2, 13

R.I. Gen. Laws § 3-8-8.1..... 1, 2, 13

Alcoholic Beverage Labeling Act of 1988, Pub. L. No. 100-690, Tit. VIII, § 8001(a)(3), 102 Stat. 4518, 4519 (codified at 27 U.S.C. 213, 215)..... 26

OTHER AUTHORITIES:

12 Moore, Federal Practice ¶ 400.-05-1 (2nd Edition 1982)..... 11

Stanley I. Ornstein and Dominique M. Hanssens, *Alcohol Control Laws and the Consumption of Distilled Spirits and Beer*, 12 J. Consumer Res. 200 (Sept. 1985)..... 21

Jon P. Nelson, *State Monopolies and Alcoholic Beverage Consumption*, 2 J. Reg. Econ. 83 (1990)..... 21

TABLE OF AUTHORITIES – Continued

Page

New York State Moreland Commission on the Alcoholic Beverage Control Law, *Report and Recommendations No. 3*, January 21, 1964 19

Gary P. Wilcox, *The Effect of Price Advertising on Alcoholic Beverage Sales*, 25 J. Advertising Reg. 33 (1985) 21

OPINION BELOW

44 Liquormart, Inc. v. State of Rhode Island, 39 F.3d 5 (1st Cir. 1994).

STATUTES

U.S. Const. amend. I

U.S. Const. amend. XXI, § 2

R.I. Gen. Laws § 3-8-7

R.I. Gen. Laws § 3-8-8.1

Regulation 32, Rhode Island Liquor Control Administration

STATEMENT OF THE CASE

Pursuant to the Twenty-first Amendment's grant of power, the State of Rhode Island has adopted a statutory scheme for the regulation of alcoholic beverages. R.I. Gen. Laws § 3-1-1 through § 3-14-15, inclusive. The stated purpose of this statutory scheme is the "promotion of temperance and for the reasonable control of the traffic in alcoholic beverages." R.I. Gen. Laws § 3-1-5. An integral part of that scheme includes a prohibition on the advertising of the *price* of alcoholic beverages by the Rhode Island media, and by the license holders themselves. R.I. Gen. Laws §§ 3-8-7 and 3-8-8.1.

On December 17, 1991, Petitioner 44 Liquor Mart, Inc. ("44 Liquor Mart") was found to be in violation of R.I.

Gen. Laws §§ 3-8-7 and 3-8-8.1 and Regulation 32 of the Rhode Island Liquor Control Administration, which also prohibits price advertising. 44 Liquor Mart was fined for that violation, paid the fine, but did not take advantage of the appeal process provided by state statute.[1] Subsequently, Petitioners filed a constitutional attack on the price advertising ban in the Federal District Court for the District of Rhode Island. *44 Liquor Mart, Inc. v. Racine*, C.A. No. 92-0115-P.[2] Petitioners' claims were based on the First Amendment of the United States Constitution; the Equal Protection, Due Process and Commerce Clauses of the United States Constitution; the Sherman Anti-Trust Act, 15 U.S.C. §§ 1-7 and 42 U.S.C. § 1983, the Civil Rights Act. Before trial, Petitioners abandoned all but their First Amendment claims.[3]

During discovery, Petitioners conceded that they would each realize an economic benefit of more than $100,000 per year if the price advertising ban were lifted. Prior to trial, the parties stipulated (among other things) that Rhode Island communications media reaches both

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[1] Petitioner People's Super Liquor is not a Rhode Island license holder. No administrative action has ever been taken against it.

[2] These statutes have survived identical constitutional attacks within the Rhode Island court system. *See Rhode Island Liquor Stores Ass'n v. The Evening Call*, 497 A.2d 331 (R.I. 1985), and *S & S Liquor Mart, Inc. v. Pastore*, 497 A.2d 729 (R.I. 1985).

[3] The First Circuit intimated that Petitioners may have had a cognizable claim under the Commerce Clause, but by waiving it at the District Court level, they abandoned it forever. 39 F.3d at 9, Petitioners' Appendix 11, 12.

Rhode Island and Massachusetts citizens, that the proposed speech (liquor price advertising) does not concern an illegal activity and presumably would not be false or misleading, and that the State of Rhode Island has a substantial interest in regulating the sale of alcoholic beverages. Petitioners' Appendix at 5, 21-22[4], *44 Liquor Mart Inc. v. Racine*, 829 F. Supp. 543, 545 (D.R.I. 1993). Pet.App. 21, 22.

After a trial which consisted of the submission of an agreed statement of facts and the videotaped depositions of three experts with supporting exhibits, the District Court found for the Petitioners. In striking down the advertising ban, that Court held that in a commercial speech analysis, the Twenty-first Amendment had no application.[5] *44 Liquor Mart Inc. v. Racine, supra* at 553; Pet.App. 42. The decision was appealed, and on October 24, 1994, the First Circuit Court of Appeals reversed, and

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[4] References to Petitioner's Appendix are hereinafter designated as "Pet.App.".

[5] The District Court applied the four-part test developed in *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*, 447 U.S. 557 (1980):

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Id. at 566, Pet.App. 35.

in upholding the statute, stated that the Twenty-first Amendment should be considered in a commercial speech case involving regulation of alcoholic beverages. *44 Liquor Mart, Inc. v. State of Rhode Island*, 39 F.3d 5 (1st Cir. 1994), Pet.App. 2-12.

SUMMARY OF ARGUMENT

There is no reason for this Court to grant Petitioners' application for a writ of certiorari as the First Circuit's decision does not conflict with any decision of this Court, and is not in conflict with any decision of any other Circuit. Further, the Petition should be denied since the First Circuit correctly phrased and applied the standard for determining whether this commercial speech may be regulated by the State. Finally, the Petition should be denied since this Court's summary dismissal in *Queensgate Investment Company v. Liquor Control Commission*, 69 Ohio St. 361, 433 N.E.2d 138 (1982), appeal dismissed, 459 U.S. 807 (1982), is controlling.

ARGUMENT

I. THE TWENTY-FIRST AMENDMENT SHOULD BE CONSIDERED IN A COMMERCIAL SPEECH CASE INVOLVING THE REGULATION OF ALCOHOLIC BEVERAGES

Petitioners incorrectly set the stage for this Court's review of the proceedings below when they state:

> The Court of Appeals thought it 'precisely in order' to give Rhode Island's restriction on

> speech an 'added presumption of validity' because of the use of that phrase in *California v. LaRue*, 409 U.S. 109, 118-119 (1972) (App. 8). The effect of the added presumption was to eliminate the state's burden to prove the validity of the price advertising ban under *Central Hudson* and to put the burden of proving invalidity on the petitioners.

Petition, pp. 7-8.

The First Circuit did *not* place the burden on Petitioners to prove the invalidity of the statute. Rather, they stated that "The burden is on the party seeking suppression, **here the State**." *44 Liquormart, Inc. v. State of R.I., supra* at 7, Pet.App. 5 (emphasis added). Later in its decision, the First Circuit reiterated that "**the state has the burden [of proof]** . . . " *Id.*

The placement of the burden, and indeed, the articulation of the burden itself, is the cornerstone of this Petition. As phrased, and as placed, the burden imposed by the First Circuit is in harmony with prior decisions of this Court, and is not in conflict with opinions from other Circuits, as Petitioners allege. The First Circuit simply afforded the Rhode Island statutes an "added presumption of validity" since alcoholic beverages were the subject of regulation. *California v. LaRue*, 409 U.S. at 118-119. From that point, the First Circuit correctly applied the four-part *Central Hudson* test set out *supra* n.5. Petitioners contend that the First Circuit's opinion is in conflict with the Fifth Circuit's decision in *Dunagin v. City of Oxford*, 718 F.2d 738 (5th Cir. 1983).[6] A cursory review of both 44

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[6] While the Fifth Circuit's decision was a plurality, it has remained good law for over eleven years.

Liquormart, Inc. and *Dunagin* clearly shows that the decisions do not conflict, rather, that they are in total harmony.

In *Dunagin,* the Fifth Circuit had the opportunity to review the constitutionality of Mississippi's near total ban on alcoholic beverage advertising. The challengers to the ban argued that it violated the First Amendment. In upholding the constitutionality of Mississippi's advertising restrictions, the Fifth Circuit discussed in detail the fact that alcoholic beverages were the subject of regulation *before* it launched into its *Central Hudson* analysis. This is entirely consistent with the First Circuit's decision and therefore Petitioners' Writ of Certiorari should be denied.

In *Dunagin,* the Fifth Circuit articulated what has come to be known as the "vice" argument. The *Dunagin* Court stated "[i]f there is any instance where a state can escape First Amendment constraint while prohibiting truthful advertising promoting lawful sales, it would be where the product being sold is intoxicating liquor". *Id.* at 743. The Fifth Circuit noted that Section 2 of the Twenty-first Amendment:

> is unique in the constitutional scheme in that it represents the only express grant of power to the states, thereby creating a fundamental restructuring of the constitutional scheme as it relates to one product-intoxicating liquors. (citation omitted).

Id. at 744.

In delineating the test to be used when considering alcohol advertising restrictions, the Fifth Circuit asserted

that any analysis of the validity of a state statute regulating liquor does not proceed via the traditional route for testing the constitutionality of state statutes. The Court determined that it should proceed from a vantage point of "presumed state power and then ask whether there are any limitations to that power, always keeping in mind that where intoxicating liquors are concerned, great deference must be accorded a comprehensive state regulatory scheme". *Id.* at 744. Further, as pointed out in *Dunagin*, "the Supreme Court has twice, in examining the interface of the First and Twenty-first Amendments, given an unusual amount of deference to state liquor regulations". This is a reference to the cases of *California v. LaRue, supra,* and *New York State Liquor Authority v. Bellanca,* 452 U.S. 714 (1981). Both of those cases give states wide latitude to accomplish a permissible end, based upon the Twenty-first Amendment. This Court cautioned in both *LaRue* and *Bellanca* that because of the Twenty-first Amendment, such policy judgments should be made by the state legislature and not by the courts.

In placing the burden, the Fifth Circuit applied the *Central Hudson* four-part test with *LaRue* and *Bellanca* in mind, and found that the statute banning liquor advertisements passed constitutional muster. *Dunagin,* 718 F.2d at 750. This is in no way in conflict with the First Circuit's opinion in the present matter and therefore no grounds exist to grant *certiorari.* It is difficult to see how the Fifth and First Circuits differ as Petitioners suggest. They simply do not and the two decisions are harmonious.

Contrary to Petitioners' assertions (Petition, p. 13), the decision of this Court in *Larkin v. Grendel's Den, Inc.,* 459 U.S. 116 (1982), *supports* the State's position in this

case. In *Larkin*, a zoning regulation was held to violate the Establishment Clause.[7] This Court, citing *California v. LaRue, supra*, stated that: "Given the broad powers of states under the Twenty-first Amendment, judicial deference . . . is especially appropriate in the area of liquor regulation." 459 U.S. at 121, 122.

The First Circuit's decision below also dovetails with that of the Tenth Circuit in *Adolph Coors v. Brady* (*Coors I*), 944 F.2d 1543 (10th Cir. 1991) and *Adolph Coors v. Lloyd Bentsen* (*Coors II*), 2 F.3d. 355 (10th Cir. 1993). In striking down a labeling provision, the Tenth Circuit correctly found that the government's authority to prohibit alcohol content in *advertising* was constitutional. It is clear that the First Circuit's decision evinces no conflict with any decision of this Court, nor of any Circuit.

II. THIS COURT'S SUMMARY DISMISSAL OF *QUEENSGATE INVESTMENT COMPANY V. LIQUOR CONTROL COMMISSION* MANDATES REJECTION OF THE INSTANT PETITION.

The case of *Queensgate Investment Company v. Liquor Control Commission, supra*, requires that the instant petition be denied. In that case, Queensgate Investment Company (hereinafter "Queensgate") was the holder of an Ohio liquor permit and was prosecuted for violating regulations of the Ohio Liquor Control Commission which prohibited off-premises price advertising of alcoholic beverages, the exact prohibition found in Rhode Island's challenged laws. After being found in violation of the

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[7] Commercial speech was not implicated.

above regulations, Queensgate appealed to the Ohio Supreme Court, and argued that the price advertising ban violated its First Amendment guarantee of freedom of speech.

In determining that the price ban did *not* violate the First Amendment, the Ohio Supreme Court applied the four part *Central Hudson* test, *supra*. The *Queensgate* court came to the logical conclusion that the advertising of drink prices and price advantages would encourage and stimulate excessive consumption of alcoholic beverages. It determined that no less extensive a regulation would achieve the same purpose. "Rather, in order to serve the same governmental interest, virtually any other regulation would be more extensive; *e.g.*, increased prices, shorter hours or reduced number of permits, would all place a greater burden on the permit holder." *Id.*, 433 N.E.2d at 141-142. Queensgate then appealed to this Court. The Ohio Liquor Control Commission filed a Motion to Dismiss the appeal for want of substantial federal question. This Court agreed with the Liquor Control Commission, and dismissed the case on that ground.

The First Circuit in the case *sub judice* discussed the effect of *Queensgate*, noting that there was no relevant factual distinction, and held that "with *Queensgate* or without, plaintiff 44 Liquormart must lose". 39 F.3d at 8, Pet.App. 9. Recognition of the precedential effect of *Queensgate* would be consistent with the Circuits.

In *Oklahoma Telecasters Association v. Crisp*, 699 F.2d 490, 497 (10th Cir. 1983), an Oklahoma constitutional provision disallowed all alcohol advertising except one sign at the retail outlet bearing the words "retail alcoholic

liquor store". After a review of the regulations involved in *Queensgate*, the Tenth Circuit found that in both cases, the State, acting under its Twenty-first Amendment powers, had chosen to prohibit some, but not all, forms of liquor advertising with the goal of decreasing the consumption and abuse of alcoholic beverages. It held that the constitutional question presented in *Queensgate* and *Oklahoma Telecasters* was substantially the same. *Id.* at 497.

In the view of the Tenth Circuit in *Oklahoma Telecasters*, *Queensgate* presented an issue concerning the tension between the First and Twenty-first Amendments. *Id.* The Tenth Circuit recognized that this Court decided that Ohio's regulation was *not* an unconstitutional infringement on Queensgate's First Amendment rights and recognized the binding effect of *Queensgate* on *all* federal courts. *Id.* The Tenth Circuit had this to say:

> The Supreme Court arguably may have decided the case on nonconstitutional grounds; if so, however, we cannot discern them. It is our view that the Supreme Court decided Ohio's regulation was not an unconstitutional infringement on the appellant's First Amendment rights. The *Queensgate* dismissal is binding on this court.

Id. at 497.

Apparently out of an abundance of caution, the Tenth Circuit undertook an independent review, and finally held that the regulations at issue passed constitutional muster:

> We again emphasize that the *Central Hudson* test is essentially a balancing test. When the Twenty-first Amendment is considered in addition to Oklahoma's substantial interest under its police

> power, the balance shifts in the state's favor, permitting regulation of commercial speech that might not otherwise be permissible. We believe that the Supreme Court's summary dismissal in *Queensgate* mandates this result.

Id. at 502.

The effect of a summary disposition at the U.S. Supreme Court level serves as binding precedent on lower federal courts. Cases before the Court by way of appeal must be resolved on the merits. However, not all cases within the courts' obligatory jurisdiction warrant plenary consideration, *i.e.*, oral argument by counsel and full opinion by the Court. The Supreme Court has thus fashioned a method to dispose of some appeals in a summary fashion. However, such summary dispositions nevertheless constitute resolutions of the merits of the claims presented. Once an issue is labeled "insubstantial" or otherwise resolved by a summary disposition, it is not open to lower court reconsideration. Dismissals of appeals for want of a substantial federal questions *are* decisions on the merits, and *are* binding upon lower courts. 12 Moore, Federal Practice ¶ 400.-05-1 (2nd Edition 1982).

The seminal case discussing the effect of a summary disposition is *Hicks v. Miranda*, 422 U.S. 332 (1975), where this Court ruled that dismissal for want of a substantial federal question *is* a decision on the merits of the case, and must be treated by lower courts as precedential authority.

The issue in *Queensgate* and in the present dispute is identical, *i.e.*, whether a ban on advertising the price of

alcoholic beverages violates the First Amendment's guarantee of free speech. The Ohio court used the four-part *Central Hudson* test, and when this decision and its reasoning were before this Court on appeal, it was held that no federal question was involved. This decision, while short, is nonetheless a decision on the merits, affirming a finding that no First Amendment rights were implicated by the price advertising ban. Therefore, *certiorari* should be denied on this ground alone.

III. THE FIRST CIRCUIT WAS CORRECT IN ITS APPLICATION OF THE *CENTRAL HUDSON* TEST TO THE STATUTES AND REGULATION AT ISSUE

There is no dispute that the *Central Hudson* four-part test applies in the instant matter.[8] The dispute arises with respect to whether, and to what extent, the Twenty-first Amendment affects the application of *Central Hudson*. The First Circuit did *not* hold that the application of the Twenty-first Amendment shifted the burden of proof as argued by the Petitioners. It simply held that the presumption of validity afforded by the Twenty-first Amendment was "precisely in order." 39 F.3d at 8, Pet.App. 8. It is obvious that the First Circuit made no shocking departure from the teachings of this Court, nor from other Circuit courts, in holding that the Twenty-first Amendment should be considered when applying the *Central Hudson* test.

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[8] The parties agreed that the first two elements had been met.

It is beyond dispute that the provisions of R.I. Gen. Laws §§ 3-8-7 and 3-8-8.1 enjoy the presumption of constitutional validity. *Donahue v. Rhode Island Department of Mental Health, Retardation and Hospitals*, 632 F. Supp. 1456 (D.R.I. 1986). The courts must, if possible, give effect to a state statute. *United Nuclear Corp. v. Cannon*, 553 F. Supp. 1220 (D.R.I. 1982). A party challenging the constitutionality of a statute has the burden of not just proving unconstitutionality, but proving it **beyond a reasonable doubt.** *Cardi Corp. v. State*, 524 A.2d 1092 (R.I. 1987); *Giebink v. Fischer*, 709 F. Supp. 1012 (D.Colo. 1989). Because of the State's power under the Twenty-first Amendment, a state statute regulating the sale of alcoholic beverages is entitled to an added presumption in favor of its validity. *LaRue, supra, Bellanca, supra, S & S Liquor Mart, Inc. v. Pastore, supra.* The Federal Courts do not sit as a "super-legislature" to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

Thus, any analysis of the validity of a state statute regulating liquor does not proceed via the traditional route for testing the constitutionality of state statutes. This Court must proceed from a vantage point of *presumed* state power, and then ask whether there are any limitations to that power, always keeping in mind that where intoxicating liquors are concerned, great deference must be accorded a comprehensive state regulatory scheme like Rhode Island's. *LaRue, supra.* "If there is any instance where a state can escape First Amendment constraint while prohibiting truthful advertising promoting

lawful sales, it would be where the product being sold is intoxicating liquor." *Dunagin, supra.*

A. The Advertising Restriction Materially Advances the Asserted Governmental Interest

This is a case in which the Rhode Island General Assembly has sought to alleviate a serious public health problem through a minor restriction of commercial speech. This Court has concluded that a legislature may reasonably presume that prohibitions of commercial speech are effective in reducing the incidence of an activity that is injurious to the public welfare. *Posadas de Puerto Rico Assoc. v. Tourism Company of Puerto Rico,* 478 U.S. 328, 343-45 (1986). Furthermore, in *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490 (1981), this Court ruled that the "accumulated common sense judgments" of the legislature should not be overturned unless they are "manifestly unreasonable". *Id.* at 509.[9]

The State has *absolute* power under the Twenty-first Amendment to prohibit the sale of liquor within its boundaries. *Bellanca, supra.* If a State has the power to totally abolish the sale of liquor, then there can be no argument that the power to regulate its sale is inherently implied. This Court, in *City of Newport, Ky. v. Iacobucci,* 479 U.S. 92, *reh'g denied,* 479 U.S. 1047 (1986), reaffirmed

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[9] The Tenth Circuit found in *Oklahoma Telecasters,* 699 F.2d at 501 that "prohibitions against the advertising of alcoholic beverages are reasonably related to reducing the sale and consumption of those beverages and their attendant problems. The entire economy of the [alcoholic beverage industry] is based on a belief that advertising increases sales".

the holdings in *Bellanca* and *LaRue*, recognizing that the Twenty-first Amendment confers broad regulatory powers on the States. *Id. Iacobucci* confirms the propriety of the "added presumption" afforded by the Twenty-first Amendment in this case.

The Federal Courts give almost absolute deference to the states in the area of liquor control. In *Dunagin, supra*, the Fifth Circuit Court of Appeals considered a statute prohibiting liquor advertisements originating within the State of Mississippi. The Fifth Circuit analyzed the constitutionality of the Mississippi statute and noted that the Twenty-first Amendment "is unique in the constitutional scheme in that it represents the only express *grant* of power to the states, thereby creating a fundamental restructuring of the constitutional scheme as it relates to one product – intoxicating liquors". *Id.* at 744. At the outset, the Fifth Circuit, citing *LaRue, supra*, acknowledged that there is an added presumption in favor of the validity of the statute banning advertising in that the Twenty-first Amendment confers "something more than the normal state authority over public health, welfare and morals." The *Dunagin* court held that the total advertising ban under scrutiny passed constitutional muster.

As pointed out in *Dunagin, supra*, it is because intoxicating liquor is, by its nature, dangerous to the morals, good order, health and safety of the people, that it is not to be placed on the same footing with the ordinary commodities of life. Therefore, statutes pertaining to control of alcoholic beverages within a state must be treated as *sui generis* apart from statutes of any other nature. See *Olitsky v. O'Malley*, 597 F.2d 295, 299 (1st Cir. 1979). Accord, *Garcia v. Arizona State Liquor Board*, 21 Ariz. App. 456, 520 P.2d 852 (1974).

Federal deference to state liquor control has been recognized in other cases, see, *e.g. LaRue, supra* (wide latitude as to the means to accomplish a permissible end must be accorded the state agency that is itself the repository of the State's power under the Twenty-first Amendment); *Olitsky supra* (given the presumption in favor of the validity of a state regulation within the compass of the Twenty-first Amendment, the question then becomes: were the regulations rational in light of the objectives sought?); *Hancock Industries v. Schaffer*, 811 F.2d 225 (3rd Cir. 1987) (it is not enough for one challenging the constitutionality of a statute to introduce evidence tending to support a conclusion contrary to that reached by the legislature); *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483 (1955) (reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind); *Bellanca, supra* (although some may quarrel with the wisdom of such legislation . . . the Twenty-first Amendment makes that a policy judgment for the state legislature, not the courts); *Oklahoma v. Burris*, 626 P.2d 1316 (Okla. 1980) (states have near absolute power to regulate liquor industry). In the present dispute, the State asserts that, in enacting the statutes, it was rational for the Rhode Island legislature to find that a ban on price advertising would further the goal of advancing temperance.

The State proffers the following theory as satisfying the third prong of *Central Hudson*:

> [T]he advertising ban directly advanced the governmental interest by increasing the cost of alcoholic beverages, thereby lowering the amount of alcohol consumption by residents of

> the State of Rhode Island. . . . [T]he State's power to totally ban any advertising about alcoholic beverages necessarily included the lesser power to restrict price advertising.

39 F.3d at 6, Pet.App. 3-4.

The third prong of *Central Hudson* does not require an empirically exact government showing if the prohibited speech concerns the sale of products associated with substantial societal harms. Rather, it provides that the regulation of commercial speech may not be sustained if it provides only "ineffective or remote support for the government's purpose. . . . " *Central Hudson*, 447 U.S. at 564. In *Posadas*, the majority found a duly sufficient constitutional "link" based on what the legislature of Puerto Rico "obviously believed," a finding the court characterized as a constitutionally "reasonable one" in these kinds of cases. 478 U.S. at 341-42. This Court was able to defer to the legislature on the basis of precedent that established the causal relationship between advertising and consumption. *Hornell Brewing Co., Inc. v. Brady*, 819 F.Supp. 1227 (E.D.N.Y. 1993) (citing *Dunagin, supra*, and *Oklahoma Telecasters, supra*).[10] Implicit in this Court's decisions cited

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[10] In a related context, this Court has recognized that people cross state lines to purchase beer at lower prices. See *Healy v. The Beer Inst.*, 491 U.S. 324, 326 (1989); *Falls City Industries, Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 437, fn.8 (1983). It is just such behavior, which reflects the close connection between consumer purchasing decisions and product information, that has led the lower federal courts and the state courts to uphold, against First Amendment challenges, state restrictions on price advertising. See *Queensgate, supra, S & S Liquor Mart, Inc., supra*. Part of the reason such restrictions reduce the consumption of alcohol, of course, is that they prevent alcohol vendors from engaging in

above is the basic notion that where certain socially harmful products are marketed or advertised, no exacting empirical proof is required. Where, for example, alcohol marketing is involved, the government need not remain hopelessly idle in combatting the social ills associated with this product until proof of certainty is tendered. Clearly, when it comes to products such as alcohol, *Central Hudson* and its progeny do not require an empirically strict showing. A constitutionally reasonable or sound link will suffice. *Metromedia*, 435 U.S. at 509.

In this case, abundant evidence was placed on the record in support of the State's case, and the First Circuit held that "there would seem inherent merit in the State's contention that competitive price advertising would lower prices, and that with lower prices there would be more sales." 39 F.3d at 7, Pet.App. 7. The State's "substantial interest", *i.e.*, promotion of temperance and the reasonable control of the traffic in alcoholic beverages, R.I. Gen. Laws § 3-1-5 is of course advanced by the advertising restriction. Evidence presented at trial was, not surprisingly, contradictory. As the First Circuit noted "Even plaintiffs' expert, whom the [District] court credited,

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price competition. *Cf. Capital Broadcasting Co. v. Mitchell*, 333 F.Supp. 582 (D.D.C. 1971) (ban on broadcast of cigarette advertising does not violate First Amendment), aff'd mem., 405 U.S. 1000 (1972); *Dunagin, supra* (prohibition of most forms of alcohol advertising does not violate First Amendment), cited with approval in *Posadas*, 478 U.S. at 347 n.10; *Oklahoma Telecasters, supra* (prohibition of all alcohol advertising except for one storefront sign does not violate First Amendment); *Princess Sea Indus., Inc. v. State*, 635 P.2d 281 (Nev. 1981) (restriction on brothel advertising does not violate First Amendment), cert. denied, 456 U.S. 926 (1982).

admitted that 'advertising has cumulative effects that are difficult to detect in studies, and that research studies have been varied and equivocal because it is a difficult topic to research.' " 39 F.3d at 7, Pet.App. 6. Even the District Court realized "[n]o less than twelve different conclusions have been reached regarding the impact of advertising on the general consumption of alcoholic beverages." 829 F. Supp. at 546, Pet.App. 22. The District Court also noted that:

> the distinguished economist John Kenneth Galbraith and the American Medical Association ("AMA") agree with [the conclusion that alcohol advertising leads to increased overall consumption]. (Tr. at 33-37). In 1986, [plaintiffs' expert] conceded, the AMA advocated a ban on alcohol advertising with the statement that such advertising affects youthful consumption and influences both brand preferences and the total volume of alcoholic beverages consumed by the public. (Tr. at 33-34). In addition, [plaintiffs' expert] acknowledged that advertising has cumulative effects that are difficult to detect in studies, and that research studies have been varied and equivocal because it is a difficult topic to research. (Tr. at 39-40).

829 F. Supp. at 548, Pet.App. 27.

While Petitioners place considerable stock in the statistic that Rhode Island is in the top 30 percent of states in total per capita consumption, (Petition at 7, 19, 20, 21, 23), this begs the question of where Rhode Island would be *without* the advertising ban.[11]

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[11] In a related context, it is extremely inappropriate for Petitioners to rely upon the New York State Moreland

Furthermore, this Court "assumes as a matter of law that advertising increases consumption of the product or service being advertised." *Cal-Almond v. U.S.D.A.*, 14 F.3d 429 (9th Cir. 1993) (citing *Posadas, supra*). Other courts facing similar factual situations have reached the conclusion advanced by the State herein – that advertising and consumption *are* directly linked. *See, e.g. Queensgate, supra,* (the advertising of drink prices and price advantages would encourage and stimulate excessive consumption of alcoholic beverages; an advertising prohibition aids the interest in preventing that consumption); *Oklahoma Telecasters Ass'n, supra* (prohibitions against the advertising of alcoholic beverages are reasonably related to reducing the sale and consumption of those beverages and their attendant problems); *Williams v. Spencer*, 622 F.2d 1200, 1205 (4th Cir. 1980) (an advertisement encouraging the use of drugs encourages actions which in fact endanger the health or safety of students); *Capital Broadcasting v. Mitchell*, 333 F. Supp. 582, 586 (D.D.C. 1971) (three-judge court), *aff'd mem.*, 405 U.S. 1000 (1972) (noting "close relationship between cigarette commercials broadcast on the electronic media and their potential influence on young people"). *No* witness disputed the State's evidence that price is an important determinant on the level of alcohol consumption. Since the State linked

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Commission on the Alcoholic Beverage Control Law, *Report and Recommendations No. 3*, January 21, 1964. (Petition at 21). Petitioners attempted to have this report introduced at trial, but failed. Therefore, this Court should disregard any argument based on this report. Citation to the statements of members of this Court from the bench is also inappropriate. (Petition at 27).

price with consumption, it must be held that the third prong of *Central Hudson* has been met.

The District Court briefly alluded to three studies discussed by all of the experts – Stanley I. Ornstein and Dominique M. Hanssens, *Alcohol Control Laws and the Consumption of Distilled Spirits and Beer*, 12 J. Consumer Res. 200 (Sept. 1985); (relied upon by the State and its expert); Jon P. Nelson, *State Monopolies and Alcoholic Beverage Consumption*, 2 J. Reg. Econ. 83 (1990); and Gary P. Wilcox, *The Effect of Price Advertising on Alcoholic Beverage Sales*, 25 J. Advertising Reg. 33 (1985). In fact, the testimony of all three experts was based in large part on some or all of these articles. 829 F. Supp. at 546, Pet.App. 22-23.

The only article which dealt directly with price advertising bans over a period of time was that by Ornstein and Hanssens, which concluded that in states where price advertising is allowed, price should be lower and consumption greater, thus indicating a positive relationship between price advertising and per capita consumption. They concluded that price advertising leads to lower price and higher consumption. The reason for this is that a ban on price advertising raises the price by increasing search costs, and this results in lower consumption. This study alone supports the First Circuit's decision.

Common sense mandates a finding that price advertising increases consumption. Why else would this action have been filed? "It is beyond our ability to understand why huge sums of money would be devoted to the promotion of sales of liquor without expected results, or continue without realized results." *Dunagin, supra* at 749. It is not "unreasonable for the State of Rhode Island to

believe that price advertising will result in increased sales of alcoholic beverages generally". *Rhode Island Liquor Stores Assoc., supra,* at 336. "We simply do not believe that the liquor industry spends a billion dollars a year on advertising solely to acquire an added market share at the expense of competitors. . . . [S]ufficient reason exists to believe that advertising and consumption are linked to justify the ban, whether or not 'concrete scientific evidence' exists to that effect." *Dunagin, supra,* at 750. In *Central Hudson, supra,* this Court acknowledged that "[Central Hudson] would not contest the advertising ban unless it believed that promotion would increase its sales. Thus, we find a direct link between the State interest and the [advertising ban]." *Id.* at 569. In *Bellanca, supra,* this Court deferred to the "common sense" conclusion of the legislature in enacting that ban. 452 U.S. at 718. See also *Metromedia, Inc., supra,* where this Court again relied on common sense in establishing a link between the governmental interest at stake and the legislation affecting commercial speech.

As this Court held in *Olitsky, supra,* the inquiry is whether it was rational for the legislature to assume that the prohibition directly advances the stated goal of temperance. Mathematical certainty is not required, nor is strict proof – only a rational belief that the statute advances the stated goals. In *Central Hudson,* this Court judicially noticed "an immediate connection between advertising and demand for electricity" and held that there was a "direct link between the state's interest in conservation and the Commission's order" (which banned promotional advertising by electric utilities.) *Central Hudson, supra* at 569. Similarly, in *Metromedia, Inc.,*

supra, this Court agreed with the "accumulated, commonsense judgments of local lawmakers" that "a legislative judgment that billboards are traffic hazards is not manifestly unreasonable" and that "[i]t is not speculative to recognize that billboards by their very nature . . . can be perceived as aesthetic harm." *Id.* at 509. Thus, San Diego's billboard ban directly advanced its substantial governmental interest of traffic safety and aesthetic appearance under the *Central Hudson* test. The *Dunagin* court held that "sufficient reason exists to believe that advertising and consumption are linked to justify the ban, whether or not 'concrete scientific evidence' exists to that effect."[12] Undisputed, scientific, laboratory tested proof is not required to establish this legislative fact. *Central Hudson, supra*. As taught in *Metromedia* and *Dunagin*, the Rhode Island General Assembly's belief that the ban on price advertising decreases the stimulation of liquor sales and consumption is entitled to great weight and should not be disturbed.

Finally, Petitioners take issue with the First Circuit's decision as being an improper election among conflicting facts. Petition at 16. To the contrary, it was proper for the First Circuit to conduct a review of the record, since, in a First Amendment challenge, an appellate court must "independently decide whether the record supports the judgment below." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 445, *reh'g denied*, 439 U.S. 883 (1978); *Rankin v. McPherson*,

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[12] The Fifth Circuit also found the decisions of other courts that have considered the connection between advertising and consumption and found a direct link to be persuasive. *See Dunagin, supra*, at 747-748.

483 U.S. 378, 385, n.8 (1987); *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499-511 (1984); *Dunagin, supra;* and *Oklahoma Telecasters, supra.*

B. The Advertising Restriction Is Narrowly Tailored to Advance the State's Substantial Interest

Petitioners would have this Court find that the statutes at issue go further than necessary to accomplish the stated purpose.[13] This Court has ruled that a prohibition of commercial speech requires a " 'fit' between the legislature's ends and the means chosen to accomplish those ends – a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition, but one whose scope is 'in proportion to the interests served' ". *Fox*, 492 U.S. 469, 480 (1989). The interest to be served by the statutes under attack is the promotion of temperance and the reasonable control of the traffic in alcoholic beverages. R.I. Gen. Laws § 3-1-5. Prohibiting disclosure of the price of an alcoholic beverage or price advantage is certainly a reasonable and effective way of preventing such harms. The restriction does not prohibit all alcoholic beverage advertising. Rather, only one tidbit of information is prohibited – price. And price advertising is allowed inside the licensed premises, to assist those who have *already decided* to purchase.

This Court and other courts have repeatedly upheld reasonable restrictions on the advertising of activities that

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[13] This, despite the observation of this Court that almost all restrictions disallowed under *Central Hudson's* fourth prong have been "substantially excessive." *Bd. of Trustees v. Fox*, 492 U.S. 469 (1989).

society deems harmful but has chosen for various reasons to tolerate. See *U.S. v. Edge Broadcasting Co.*, ___ U.S. ___, 113 S. Ct. 2696 (1993) (lotteries); *Posadas, supra,* (casino gambling); *Queensgate, supra* (per curiam) (liquor price advertising); *Capital Broadcasting Co. v. Mitchell, supra,* (broadcast cigarette advertising); *Dunagin, supra* (signs advertising liquor); *Oklahoma Telecasters Ass'n, supra,* (prohibition of all alcohol advertising except for one storefront sign); *S & S Liquor Mart Inc., supra,* (alcohol price advertising); *Rhode Island Liquor Stores Ass'n, supra,* (alcohol price advertising); *Princess Sea Indus., Inc., supra,* (brothel advertising). These decisions indicate that legislatures are entitled to especially broad latitude in regulating speech that promotes activities that the legislatures reasonably determine give rise to especially great social harms.

Greater deference to legislative judgment with regard to socially harmful activities is justified by the rationale underlying this Court's commercial speech doctrine. As a general matter, commercial speech enjoys only "a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values." *Fox*, 492 U.S. at 477 (quoting *Ohralik*, 436 U.S. at 456); see *Edge Broadcasting*, ___ U.S. at ___, 113 S. Ct. at 2703; *Central Hudson*, 447 U.S. at 563. That is because commercial speech "is 'linked inextricably' with the commercial arrangement that it proposes," Edenfield, ___ U.S. ___, 113 S. Ct. at 1798 (quoting *Friedman v. Rogers*, 440 U.S. 1, 10 n.9 (1979)), and commercial activity is "an area traditionally subject to government regulation," *Edge Broadcasting*, ___ U.S. at ___, 113 S. Ct. at 2703 (quoting *Ohralik*, 436 U.S. at 456). The government's greater interest in, and

authority over, regulation of commercial activity gives it greater interest in, and authority over, regulation of "the expression itself," *Edenfield*, ___ U.S. at ___, 113 S. Ct. at 1798, than it has with respect to other forms of expression.

Certain commercial activities, such as gambling and the sale of alcoholic beverages, have traditionally been considered to pose particularly great risks of social harm. See, e.g., *Posadas*, 478 U.S. at 341 (casino gambling); *Stone v. Mississippi*, 101 U.S. 814, 818 (1880) (lotteries); Alcoholic Beverage Labeling Act of 1988, Pub. L. No. 100-690, Tit. VIII, § 8001(a)(3), 102 Stat. 4518, 4519 (codified at 27 U.S.C. 213, 215) (congressional findings regarding harms of alcohol consumption and abuse). Such activities accordingly have long been subject to particularly close regulation by the States and the federal government. See *Edge Broadcasting, supra* (history of lottery regulation); and *Craig v. Boren*, 429 U.S. 190, 205-206, nn.18-19 (1976) (history of alcohol regulation). Indeed, the States plainly have authority under the Twenty-first Amendment to impose an outright ban on alcohol sales and consumption within their borders. See, e.g., *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980). Similarly, the federal government's authority to regulate alcohol under the Commerce Clause is broad. See, e.g., *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 346-347 (1987); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 274-276 (1984); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 712-713 (1984); *California Retail Liquor Dealers Ass'n*, 445 U.S. at 108-110; *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 331-332 (1964).

The particularly strong governmental interest in regulating activities such as alcohol consumption gives rise to a concomitantly strong interest in regulating speech promoting those activities. Cf. *Edenfield, supra; Posadas,* 478 U.S. at 345-347. By the same token, because such speech is "linked inextricably" (*Edenfield,* ___ U.S. at ___, 113 S. Ct. at 1798) to a socially harmful activity, it warrants even less protection under the First Amendment than other forms of commercial speech. Thus, the balance of interests tips more sharply in favor of upholding a regulation of speech in this area than in other areas of commercial activity. For that reason alone, any doubt as to whether Rhode Island's advertising restriction satisfies the *Central Hudson* test for regulations of commercial speech must be resolved in favor of upholding the restriction.

Bellanca, supra, involved a First Amendment challenge to a statutory prohibition on nude dancing in establishments also holding liquor licenses. This Court affirmed its earlier position that a state has *absolute* power under the Twenty-first Amendment to totally prohibit the sale of liquor within its boundaries. *Id.* at 715, *citing Ziffrin, Inc. v. Reeves,* 308 U.S. 132 (1939). It is equally well established that a state has broad power under the Twenty-first Amendment to regulate the times, places, and circumstances under which liquor may be sold. *Id.* This Court cited *California v. LaRue, supra,* where the constitutionality of a statute prohibiting acts of gross sexuality in establishments licensed by the state to serve liquor was attacked. Although the Court found that not all of the acts prohibited were obscene, the statute was affirmed as within the state's broad power under the

Twenty-first Amendment to regulate the sale of liquor. The Court declined to restrict the application of the Twenty-first Amendment only to the Commerce Clause. Rather, the Supreme Court affirmed that the Twenty-first Amendment's sweep in such cases is broad. Again in *Bellanca*, this Court stated "pursuant to its power to regulate the sale of liquor within its boundaries, [the State] has banned topless dancing in establishments granted a license to serve liquor. The State's power to ban the sale of alcoholic beverages entirely includes the lesser power to ban the sale of liquor on premises where topless dancing occurs". *Id.* at 717.

Petitioners would have this Court believe that all alternative forms of liquor control must be exhausted before the advertising restrictions could be utilized. This is simply contrary to all teachings of this Court, and the lower federal courts. As the First Circuit noted "[t]he State is entitled to a reasonable choice. This includes choice of method – it is not obliged to prove that some other method, e.g., taxation, would be less effective." (citing *Fox, supra*). 39 F.3d at 7, Pet.App. 6. The restriction cannot be challenged on the ground that price wars could be combatted just as effectively by increasing the State's sales tax. As this Court explained in a similar context, "it is up to the legislature to decide whether or not such a counterspeech policy would be as effective" as the advertising restriction. *Posadas*, 478 U.S. at 344. The fourth part of the *Central Hudson* test does not force the State to choose between the two methods of regulation. See *Dunagin*, 718 F.2d at 751 & n.9.

CONCLUSION

It is clear from the facts and law recited above that the decision of the First Circuit is not in conflict with any other Circuit. No intercession by this Court is necessary. Further, precedent as established in *Queensgate, supra,* mandates denial of the Petition. Finally, since the First Circuit correctly articulated and applied the burden of proof, this Petition should be denied, and the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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SUPREME COURT, U.S.
FILED
FEB 1 1995
OFFICE OF THE CLERK

No. 94-1140

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

44 LIQUORMART, INC. and
PEOPLES SUPER LIQUOR STORES, INC.,
Petitioners,

v.

STATE OF RHODE ISLAND and
RHODE ISLAND LIQUOR STORES ASSOCIATION,
Respondents.

On a Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS	1
STATEMENT	2
REASONS FOR GRANTING THE WRIT	3
CONCLUSION	8

TABLE OF AUTHORITIES

CASES: Page

Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456 (1991) 6
California v. LaRue, 409 U.S. 109 (1972) 6
Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984) 5
Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557 (1980) 2, 4
City of Cincinnati v. Discovery Network, Inc., 113 S. Ct. 1505 (1993) 4, 7
City of Newport, Ky. v. Iacobucci, 479 U.S. 92 (1986) 6
Craig v. Boren, 429 U.S. 190 (1976) 5
Doran v. Salem Inn, Inc., 422 U.S. 922 (1975) 6
Dunagin v. City of Oxford, Miss., 718 F.2d 738 (5th Cir. 1983) (*en banc*), *cert. denied*, 467 U.S. 1259 (1984) 4-5
Edenfield v. Fane, 113 S. Ct. 1792 (1993) 6
Ibanez v. Florida Dep't of Business & Professional Regulation, 114 S. Ct. 2084 (1994) 2, 6
Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982) .. 5
Michigan Beer & Wine Wholesalers Ass'n v. Attorney Gen., 370 N.W.2d 328 (Mich. Ct. App. 1985), *cert. denied*, 479 U.S. 939 (1986) 5
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Oklahoma Telecasters Ass'n v. Crisp, 699 F.2d 490 (10th Cir. 1983), *rev'd on other grounds sub nom. Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984) 4
Pennsylvania State Police, Bur. of Liquor Cont. Enforcement v. Hospitality Invs. of Phila., Inc., 1994 WL 643906 (Pa. Nov. 3, 1994), *petition for cert. filed* (U.S. Jan. 20, 1995) (No. 94-1247) 3, 5
Wisconsin v. Constantineau, 400 U.S. 433 (1971) .. 5

STATUTES AND OTHER AUTHORITIES:

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TABLE OF AUTHORITIES—Continued

Page

Conn. Dep't of Liquor Cont. Regs. § 30-6-A40 (1976) *reprinted in* Liquor Cont. L. Rep. (CCH) [Conn.] ¶ 6034H (1994) 7

Ga. Alco. Bev. Code § 560-2-4-.15 (1994) *reprinted in* Liquor Cont. L. Rep. (CCH) [Ga.] ¶ 4158 (1994) 7

Kan. Stat. Ann. § 41-714(2) (1991) *reprinted in* Liquor Cont. L. Rep. (CCH) [Kan.] ¶¶ 7236-38 (1994) 7

Minn. Liquor Cont. Div. Regs. § 7515.0760(2) (1985) *reprinted in* Liquor Cont. L. Rep. (CCH) [Minn.] ¶ 4038(2) (1994) 7

Mo. Div. of Liquor Cont. Regs. § 11 CSR 70-2.240(18) (1986) *reprinted in* Liquor Cont. L. Rep. (CCH) [Mo.] ¶ 4142G(18) (1994) 7

N.H. Rev. Stat. Ann. § 179:51 (1992) *reprinted in* Liquor Cont. L. Rep. (CCH) [N.H.] ¶ 7251 (1994) 7

N.C. Admin. Code tit. 4, r. 2R.1008(c)(2) (1984) *reprinted in* Liquor Cont. L. Rep. (CCH) [N.C.] ¶ 4448(c)(2) (1994) 7

Ohio Rev. Code Ann. § 4301.211 (Anderson 1989) *reprinted in* Liquor Cont. L. Rep. (CCH) [Ohio] ¶ 7172A (1994) 7

R.I. Gen. Laws § 3-8-7 (1987) *reprinted in* Liquor Cont. L. Rep. (CCH) [R.I.] ¶ 7210 (1994) 7

S.C. Alco. Bev. Cont. Comm'n § 7-34 (1991) *reprinted in* Liquor Cont. L. Rep. (CCH) [S.C.] ¶ 4034 (1994) 7

Laurence H. Tribe, *American Constitutional Law* § 6-24 (2d ed. 1988) 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1140

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44 LIQUORMART, INC. and
PEOPLES SUPER LIQUOR STORES, INC.,
Petitioners,

v.

STATE OF RHODE ISLAND and
RHODE ISLAND LIQUOR STORES ASSOCIATION,
Respondents.

On a Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF OF AMICUS CURIAE ASSOCIATION OF NATIONAL ADVERTISERS, INC.

INTEREST OF AMICUS

The Association of National Advertisers, Inc. ("A.N.A."), the advertising industry's oldest trade association, is exclusively dedicated to enhancing the ability of businesses to advertise on a national and regional basis. With more than 2,000 subsidiaries, divisions and operat-

ing units, A.N.A. members market a kaleidoscopic array of goods and services and account for almost 80 percent of the nation's annual national and regional advertising expenditures. As the nation's principal community of commercial speakers, A.N.A. has long been committed to the advancement of truthful, non-deceptive commercial speech designed to permit consumers to make informed and autonomous choices in the marketplace.[1]

STATEMENT

The facts of the case are ably set forth in the petition for certiorari. For purposes of this brief, the key point is the First Circuit's reliance on the Twenty-first Amendment to dilute the test for judging the constitutionality of restrictions on commercial speech. That four-prong test was originally set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980) (*"Central Hudson"*), and has been affirmed and reinforced in a long line of decisions, the most recent of which is *Ibanez v. Florida Department of Business & Professional Regulation*, 114 S. Ct. 2084 (1994) (*"Ibanez"*).

Addressing the third prong of *Central Hudson*, the First Circuit initially recognized that a State has the burden of proving that its restriction on commercial speech directly advances the asserted governmental interest. App. 4-5.[2] But the First Circuit then effectively reversed that burden by holding that the Twenty-first Amendment requires an "added presumption" in favor of the State if the regulated speech concerns alcohol beverages. Based in part on that "added presumption," the First Circuit found that the third prong had been satisfied. App. 8.

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[1] A.N.A. has filed with the Court the parties' letters of consent to the filing of this brief.

[2] The citation form "App. ——" refers to the appendix to the petition herein.

REASONS FOR GRANTING THE WRIT

The federal and state courts conflict as to whether the Twenty-first Amendment affects the First Amendment's protection of commercial speech that concerns alcohol beverages. Although we are mindful of the Court's reluctance to consider *amicus* briefs on petitions for certiorari, extraordinary circumstances are present: petitions for certiorari on the Twenty-first Amendment issue are pending both in this case and in *Pennsylvania State Police, Bureau of Liquor Control Enforcement v. Hospitality Investments of Philadelphia, Inc.*, 1994 WL 643906 (Pa. 1994), *petition for cert. filed* (U.S. Jan. 20, 1995) (No. 94-1247) ("*Hospitality Investments*"). The only realistic prospect for resolving the growing conflict on this important constitutional issue is a decision from the Court in either or both this case and *Hospitality Investments*.

At one end of the spectrum lie the three cases that have held that the Twenty-first Amendment reduces commercial speech rights, but those cases are in substantial disagreement as to the extent of that reduction. In *Hospitality Investments*, the Supreme Court of Pennsylvania has taken the most extreme position by holding that the Twenty-first Amendment strips commercial speech concerning alcohol beverages of all First Amendment protection, and that the intermediate scrutiny of *Central Hudson* must be replaced by a test of whether the State's restriction "bear[s] a reasonable relation to the evil sought to be controlled." *Hospitality Investments*, 1994 WL 643906 at *1-*2. Like the First Circuit in this case, the Pennsylvania Court upheld a ban on price advertising for alcohol beverages. *Id.* at *3. A powerful dissent criticized the majority for "simply go[ing] too far in sustaining the challenged regulation without an analysis of the free speech protections afforded the licensee under the First Amendment of the federal constitution . . . ." *Id.* at *8 (Castille, J., dissenting). Indeed, the Pennsylvania

Court's creation of a "reasonable relationship" test contravenes this Court's explicit statement that it has "rejected mere rational basis review" in judging restrictions on commercial speech. *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1510 n.13 (1993) (*"Discovery Network"*).

The other two courts that have relied on the Twenty-first Amendment—the First Circuit here and the Tenth Circuit—at least purport to apply *Central Hudson*, but differ as to how that test should be altered where commercial speech concerns alcohol beverages. *See* App. 1-12; *Oklahoma Telecasters Ass'n v. Crisp*, 699 F.2d 490, 499-500 (10th Cir. 1983) (*"Oklahoma Telecasters"*), *rev'd on other grounds sub nom. Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984). The First Circuit here appeared to rely on the Twenty-first Amendment solely to relax its scrutiny under the third prong—whether the restriction on speech directly and materially advances the asserted governmental interest. App. 8. In *Oklahoma Telecasters*, the Tenth Circuit stated that the Twenty-first Amendment required it to give added deference to the government not only under the third prong, but also the second prong—whether the asserted governmental interest is substantial—*and* the fourth prong—whether the restriction is no more extensive than necessary to serve the asserted interest. 699 F.2d at 499-502.

At the opposite end of the spectrum of cases lies *Dunagin v. City of Oxford, Miss.*, 718 F.2d 738 (5th Cir. 1983) (*en banc*), *cert. denied*, 567 U.S. 1259 (1984). There, a majority of the 13 judges of the Fifth Circuit who considered this issue *en banc* expressly rejected the argument that the Twenty-first Amendment weakens the First Amendment's protection of alcohol beverage advertising. *Id.* at 755 (five dissenting judges incorporating prior panel opinion (701 F.2d 314, 330) that the Twenty-first Amendment does "not change the standard of review" for restrictions on commercial speech); *id.* at 753-54 (two concurring judges rejecting expansion of Twenty-first

Amendment as "mischievous and insidious").[8] Similarly, the Michigan Court of Appeals held in *Michigan Beer and Wine Wholesalers Association v. Attorney General*, 370 N.W.2d 328, 335 (Mich. Ct. App. 1985), *cert. denied*, 479 U.S. 939 (1986), that the "Twenty-first Amendment does not require us to deal with restraints on freedom of speech any differently than we would if alcoholic beverages were not involved."

The conflict in the state and federal courts should be resolved in favor of according full commercial speech protection to truthful, non-misleading alcohol beverage advertising. "The Twenty-first Amendment does not license the States to ignore their obligations under other provisions of the Constitution." *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 712 (1984) (citations omitted). Rather, " 'the Amendment primarily created an exception to the normal operation of the Commerce Clause.' " *Id.* (citation omitted). Accordingly, this Court has held repeatedly that the Twenty-first Amendment does not alter the customary judicial analysis of governmental restrictions on individual constitutional rights. *See Craig v. Boren*, 429 U.S. 190, 207 (1976) (equal protection rights); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 122 n.5 (1982) (First Amendment establishment clause rights); *Wisconsin v. Constantineau*, 400 U.S. 433, 436 (1971) (due process rights).

By ignoring this principle of Twenty-first Amendment jurisprudence, both the First Circuit here and the Pennsylvania Court in *Hospitality Investments* instead erroneously expanded the narrow exception that applies only where States prohibit simulated sexual acts, nudity or topless dancing on premises licensed to sell alcohol. App. 8; *Hospitality Investments*, 1994 WL 643906 at *2-*3. In

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[8] The *Dunagin* court upheld the constitutionality of Mississippi's intrastate liquor advertising ban, but only the plurality opinion, adopted by a six-judge minority, relied on the Twenty-first Amendment.

that special context, this Court has held that the Twenty-first Amendment confers an "added presumption in favor of the validity of the state regulation." *California v. LaRue*, 409 U.S. 109, 118 (1972); *see City of Newport, Ky. v. Iacobucci*, 479 U.S. 92, 97 (1986); *New York State Liquor Auth. v. Bellanca*, 452 U.S. 714, 718 (1981). *LaRue, Bellanca* and *Iacobucci* are not relevant because (1) the challenged statutes in each were an exercise of core Twenty-first Amendment power to regulate the environment in which alcohol sales take place on licensed premises—nowhere else—and thus only indirectly regulated expressive activity, *and* (2) they involved expression (conduct, really) "only marginally" within "the outer perimeters of the First Amendment," *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456, 2457 (1991). *See Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932-33 (1975); Laurence H. Tribe, *American Constitutional Law* § 6-24 at 478 n.15 (2d ed. 1988). In contrast, the restrictions on price advertising here and in *Hospitality Investments* regulate pure commercial speech, not marginal expressive conduct, and prohibit price advertising everywhere *except* on licensed premises.

In addition to the need to resolve the conflict among the state and federal courts, the Court also should grant the petition in either or both this case and *Hospitality Investments* because of the importance of the First Amendment rights at stake. Just last year, the Court emphasized that commercial speech rights are highly protected from governmental restrictions:

> The State's burden is not slight; the "free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful."

Ibanez, 114 S. Ct. at 2089 (citation omitted); *see Edenfield v. Fane*, 113 S. Ct. 1792, 1800 (1993).

The decisions in both this case and *Hospitality Investments* erroneously rely on the Twenty-first Amendment to "seriously underestimate[]" the commercial speech rights of every participant in the alcohol beverage industry. *See Discovery Network*, 113 S. Ct. at 1511. Moreover, the impact of the Twenty-first Amendment on those rights is likely to be the subject of more litigation because many states have imposed similar restrictions on alcohol beverage advertising.[4] The federal and state courts that

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[4] *See, e.g.*, Ark. Alco. Bev. Cont. Div. Regs. 3.17 (1991) *reprinted in* Liquor Cont. L. Rep. (CCH) [Ark.] ¶ 4217 at 7247 (1994) (prohibiting advertising of discount sales); Conn. Dep't of Liquor Cont. Regs. § 30-6-A40 (1976) *reprinted in* Liquor Cont. L. Rep. (CCH) [Conn.] ¶ 6034H at 10,221 (limiting price advertising); Ga. Alco. Bev. Code § 560-2-4-.15 (1994) *reprinted in* Liquor Cont. L. Rep. (CCH) [Ga.] ¶ 4158 at 13,244 (prohibiting price advertising by "off-premise" licensees except within the establishment); Kan. Stat. Ann. § 41-714(2) (1991) *reprinted in* Liquor Cont. L. Rep. (CCH) [Kan.] ¶¶ 7236-38 at 18,427 (prohibiting retailers from billboard advertising); Minn. Liquor Cont. Div. Regs. § 7515.0760(2) (1985) *reprinted in* Liquor Cont. L. Rep. (CCH) [Minn.] ¶ 4038(2) at 25,222 (banning price advertising except in windows and premises of licensed establishments); Mo. Div. of Liquor Cont. Regs. § 11 CSR 70-2.240(18) (1986) *reprinted in* Liquor Cont. L. Rep. (CCH) [Mo.] ¶ 4142G(18) at 27,232 (prohibiting manufacturers and wholesalers from price advertising); N.H. Rev. Stat. Ann. § 179:51 (1992) *reprinted in* Liquor Cont. L. Rep. (CCH) [N.H.] ¶ 7251 at 31,429-30 (prohibiting listing of retail prices by a wholesaler on behalf of a distributor); N.C. Admin. Code tit. 4, r. 2R.1008(c)(2) (1984) *reprinted in* Liquor Cont. L. Rep. (CCH) [N.C.] ¶ 4448(c)(2) at 35,254 (prohibiting "on-premise" licensees from advertising the brand name of any alcohol beverage); Ohio Rev. Code Ann. § 4301.211 (Anderson 1989) *reprinted in* Liquor Cont. L. Rep. (CCH) [Ohio] ¶ 7172A at 37,419 (prohibiting price advertising for malt beverages except within the licensed establishment); R.I. Gen. Laws § 3-8-7 (1987) *reprinted in* Liquor Cont. L. Rep. (CCH) [R.I.] ¶ 7210 at 41, 423-3 (prohibiting price advertising for alcohol beverages except within the licensed establishment); S.C. Alco. Bev. Cont. Comm'n § 7-34 (1991) *reprinted in* Liquor Cont. L. Rep. (CCH) [S.C.] ¶ 4034 at 42,212 (prohibiting retailers from price advertising).

will hear those future lawsuits need guidance from this Court on the Twenty-first Amendment issue—guidance that is sorely lacking from the irreconcilable array of decisions rendered by the lower courts during the past 12 years.

CONCLUSION

The petition for certiorari in either or both this case and *Hospitality Investments* should be granted.

Respectfully submitted,

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Court, U.S.
FILED
JUN 26 1995
OFFICE OF THE CLERK

No. 94-1140

In The

Supreme Court of the United States

October Term, 1994

44 LIQUORMART, INC. and PEOPLES SUPER LIQUOR STORES, INC.,

Petitioners,

v.

STATE OF RHODE ISLAND and RHODE ISLAND LIQUOR STORE ASSOCIATION,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF OF THE INSTITUTE FOR JUSTICE AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE 1

STATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 3

I. PRICE INFORMATION AND ADVERTISING ARE VITAL COMPONENTS OF A MARKET ECONOMY THAT MUST BE PROTECTED UNDER THE FIRST AMENDMENT 3

II. RHODE ISLAND'S PRICE ADVERTISING PROHIBITION IS AN ANTI-COMPETITIVE, PROTECTIONIST LAW THAT BENEFITS ONE SEGMENT OF THE ALCOHOLIC BEVERAGE INDUSTRY TO THE ULTIMATE DETRIMENT OF CONSUMERS 7

III. COMMERCIAL SPEECH SHOULD BE GRANTED THE SAME PROTECTION UNDER THE FIRST AMENDMENT AS OTHER FORMS OF SPEECH AND EXPRESSION 12

CONCLUSION 19

TABLE OF AUTHORITIES

Page

CASES

Board of Trustees of State University of New York v. Fox, 492 U.S. 469 (1989) 17, 18

Cal-Almond, Inc. v. United States Dep't of Agriculture, 14 F.3d 429 (9th Cir. 1993) 15

Central Hudson Gas & Electric Corp. v. Public Service Commission of N.Y., 447 U.S. 557 (1980) ..... *passim*

City of Cincinnati v. Discovery Network, Inc., 113 S.Ct. 1505 (1993) 12, 17, 18

Craig v. Boren, 429 U.S. 190 (1976) 14

Edenfield v. Fane, 113 S.Ct. 1792 (1993) 12, 13, 15, 16, 17

44 Liquormart, Inc. v. Rhode Island, 39 F.3d 5 (1st Cir. 1994) 8, 9, 10, 13

Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982) 14

Lemon v. Kurtzman, 403 U.S. 602 (1972) 14

MD II Entertainment, Inc. v. City of Dallas, 28 F.3d 492 (5th Cir. 1994) 16

Posadas De Puerto Rico Associates v. Tourism Co. of Puerto Rico, 478 U.S. 328 (1986) 17, 18

Rubin v. Coors Brewing Company, 115 S.Ct. 1585 (1995) 12, 19

Virginia State Board of Pharmacy v. Virginia Consumer Council, 425 U.S. 748 (1976) 3, 6, 12

STATUTES

R.I. Gen. Laws § 3-1-5 8

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Buchanan, Tollison, & Tullock, *Toward a Theory of a Rent-Seeking Society* (1981) 10

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Friedman, Milton and Rose, *Free to Choose* (1979) 5

Gwartney, "Public Choice and the Conduct of Representative Government," *Public Choice and Constitutional Economics* (Gwartney & Wagner eds. 1988) 11

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Hayek, *The Use of Knowledge in Society*, 35 Am. Econ. Rev. 519 (1945), *reprinted in The Essence of Hayek* (Nishiyama & Leube eds. 1984)..... 4

New York State Moreland Commission on the Alcoholic Beverage Control Law, *Report and Recommendations No. 3* (January 21, 1964)..... 8

Stigler, *The Economics of Information*, 69 Journal of Political Economy (1961), *reprinted in The Essence of Stigler* (Leube & Moore eds. 1986) 6

The Federalist No. 10 (Madison) 11

von Mises, *Human Action* (1949).....5, 6

INTEREST OF AMICUS CURIAE

The Institute for Justice is a nonprofit, public interest law center committed to defending essential foundations of a free society and securing greater protection for individual liberty. Toward that end, the Institute seeks to reinvigorate the founding principles of the First Amendment by protecting the free flow of political and commercial information indispensable to our republican form of government and to our free enterprise economy. The instant case involves not only the level of constitutional protection afforded commercial speech, but is of fundamental importance to both a market economy and to consumers. The Institute's brief critiques the Rhode Island law primarily from the perspective of the ultimate beneficiary of commercial information: the consumer.

The Institute for Justice has obtained the consent of the parties to the filing of this brief and letters of consent have been filed with the Clerk.

STATEMENT OF THE CASE

Rhode Island has prohibited advertising the price of alcoholic beverages within the state since 1956. Retail alcoholic beverage dealers are not permitted to advertise their prices, and communications media within the state are prohibited from accepting advertisements that contain any reference to price. The law only applies to price advertising; all other forms of advertisements concerning alcoholic beverages are permitted. As a result of the prohibition, Rhode Island consumers can only learn the price of alcoholic beverages within licensed retail stores.

The sole justification provided by the state for the price advertising prohibition is to promote temperance.

The Liquor Control Administrator expansively interprets and aggressively enforces the ban. The record below demonstrates that one of the petitioners in the instant case was fined for violating the ban merely for containing within an advertisement the words "WOW" and "SALE." The advertisement did not state any prices. The record further demonstrates that other liquor licensees and newspapers have been warned and fined for violating the prohibition.

The petitioners operate retail stores for the sale of alcoholic beverages and seek to advertise the prices of their products. They challenged the constitutionality of the price advertising ban in the United States District Court for the District of Rhode Island, which struck down the ban as a violation of the First Amendment. The United States Court of Appeals for the First Circuit, however, reversed the lower court and upheld the ban. The question on which this Court granted *certiorari* was whether "Rhode Island may, consistent with the First Amendment, prohibit truthful, non-misleading price advertising regarding alcoholic beverages."

SUMMARY OF THE ARGUMENT

The free flow of price information is essential for consumers to make informed decisions. By prohibiting price advertising for alcoholic beverages, Rhode Island has deprived consumers of information that is vital to a well-functioning, market economy. As several Nobel Prize-winning economists have explained, interference

with the dissemination of price information has undesirable and, if taken to its logical extreme, devastating economic and social consequences.

The most pronounced effect of Rhode Island's price advertising ban is economic protectionism. A retail alcoholic beverage association supports the price advertising prohibition – and has joined as party to the instant case on the side of the state – because it fears that advertising may bring about increased competition and lower prices. The state should not be permitted to violate free speech rights, quash competition, and limit consumer choice in order to advance the economic interests of one component of the alcoholic beverage industry.

Under the First Amendment, "commercial" and "noncommercial" speech should be granted equal protection and all regulations that restrict commercial information should be subject to strict scrutiny review. Whatever standard of review is applied in the instant case, however, Rhode Island's price advertising prohibition does not pass constitutional muster.

ARGUMENT

I. PRICE INFORMATION AND ADVERTISING ARE VITAL COMPONENTS OF A MARKET ECONOMY THAT MUST BE PROTECTED UNDER THE FIRST AMENDMENT.

In *Virginia State Board of Pharmacy v. Virginia Consumer Council*, 425 U.S. 748 (1976), this Court recognized that two pillars of a market economy – price information

and advertising – are entitled to constitutional protection. Price information is "indispensable to the proper allocation of resources in a free enterprise system." *Id.* at 765. This Court's understanding of the crucial role of prices in a market economy has a solid foundation in economic theory. In his seminal essay, *The Use of Knowledge in Society*, Friedrich Hayek recognized that the price system is the central organizing mechanism of a market economy:

> We must look at the price system as such a mechanism for communicating information if we want to understand its real function . . . . The most significant fact about this system is the economy of knowledge with which it operates, or how little individual participants need to know in order to be able to take the right action. In abbreviated form, by a kind of symbol, only the most essential information is passed on and passed on only to those concerned. It is more than a metaphor to describe the price system as a kind of machinery for registering change, or a system of telecommunications which enables individual producers to watch merely the movement of a few pointers, as an engineer might watch the hands of a few dials, in order to adjust their activities to changes of which they may never know more than is reflected in the price movement. . . . Through [the price system] not only a division of labor but also a coordinated utilization of resources based on an equally divided knowledge has become possible.

Hayek, *The Use of Knowledge in Society*, 35 Am. Econ. Rev. 519 (1945), *reprinted in The Essence of Hayek* 211, 219-21 (Nishiyama & Leube eds. 1984). Thus, not only does a

price system coordinate economic activity on a grand scale, but it also gives consumers essential information in efficient form, provides the proper incentives for producers to adopt the best and lowest-cost methods of production, and directs resources to their most valued uses.

In a market economy, prices arise spontaneously, through the voluntary interactions of thousands of producers, sellers, and buyers. As economists Milton and Rose Friedman point out, the "price system works so well, so efficiently, that we are not even aware of it most of the time. We never realize how well it functions until it is prevented from functioning, and even then we seldom recognize the source of trouble." Friedman, Milton and Rose, *Free to Choose* 14 (1979). The "source of trouble," as the Friedmans and numerous other free market economists recognize, is governmental attempts to interfere with price information. Indeed, some of the most powerful and prophetic critiques of now-failed central economic planning schemes demonstrated the inability of government officials to coordinate economic activity without a price system. *See, e.g.*, Hayek, *The Road to Serfdom* 49-50 (1944); von Mises, *Human Action* 716-79 (1949). Without a price mechanism, it becomes impossible to allocate supply and demand, which inevitably leads to shortages, surpluses, and economic dislocation.

Although this country never tried to entirely eliminate the price system, government at all levels nevertheless interferes with price information in myriad ways. Even less comprehensive restrictions on price information, such as the Rhode Island law at issue in the instant

case, inevitably cause inefficient and undesirable consequences, discussed *supra*.

This Court also recognized in *Virginia State Board* that the right of producers to effectively transmit price information – to advertise – must be preserved. *Id.* at 765 ("advertising . . . is . . . dissemination of information as to who is producing and selling what product, for what reason, and at what price"). Although advertising is maligned by some individuals and organizations, this Court's understanding of advertising as a vehicle for transmitting essential information also has a solid basis in economic theory.

Economist George Stigler recognized that advertising is simply a method of providing potential buyers with knowledge of the identity of sellers and the products and prices they offer. Stigler, *The Economics of Information*, 69 Journal of Political Economy (1961), *reprinted in The Essence of Stigler* 46, 55 (Leube & Moore eds. 1986). The purpose of advertising, according to Stigler, is nothing less than the elimination of ignorance on the part of consumers. Consumer ignorance does not imply stupidity, but rather a lack of knowledge concerning the identity of sellers, the prices and quality of products, and other information consumers need to make informed economic decisions.

For years, economists were puzzled by the wide price differences for the same product even in a small geographical area. Many economists attributed such price differentials among businesses as evidence of a noncompetitive market for a particular product. Stigler, however, viewed these price differences as simply the result of

consumers not having the knowledge of different prices for products. If consumers possessed such information, they would naturally buy products from the businesses that offered the lowest price. The primary means for sellers to make consumers aware of their prices, and overcome consumer ignorance, is through advertising. Sellers, such as the petitioners in the instant case, benefit directly from advertising as consumers become aware of both a firm's existence and its prices, thereby increasing the likelihood of greater sales and profits for the business.

Sellers, however, are not the primary beneficiaries of price advertising. As buyers become aware of price differences, they will naturally patronize businesses that have the lowest prices. As a result, businesses will have to reduce their prices or offer other incentives in order to attract customers. The competition among sellers that results from easily available price information and advertising thus directly benefits consumers. As the following section more substantially sets forth, the ability of Rhode Island consumers to take advantage of lower prices as a result of vigorous competition is eviscerated by Rhode Island's ban on alcohol price advertising.

II. RHODE ISLAND'S PRICE ADVERTISING PROHIBITION IS AN ANTI-COMPETITIVE, PROTECTIONIST LAW THAT BENEFITS ONE SEGMENT OF THE ALCOHOLIC BEVERAGE INDUSTRY TO THE ULTIMATE DETRIMENT OF CONSUMERS.

The only justification offered by the State of Rhode Island for its ban on alcohol price advertising is the

promotion of "temperance." *44 Liquormart, Inc. v. Rhode Island*, 39 F.3d 5 (1st Cir. 1994); R.I. Gen. Laws § 3-1-5. The appeals court accepted at face value the state's justification, claiming that "there would seem inherent merit in the State's contention that competitive price advertising would lower prices, and that with lower prices there would be more sales." *44 Liquormart*, 39 F.3d at 7. Rhode Island claims that "price wars" would inevitably result from a competitive market in alcohol, thus triggering greatly increased levels of alcohol consumption.

Rhode Island's disapproval of price competition in the retail alcohol market cannot, however, negate one very simple fact – absolutely no credible evidence exists demonstrating a connection between lower alcohol prices and increased alcohol consumption. Indeed, many studies of the alcohol market demonstrate that there is no connection between lower prices and increased demand. For instance, a well-known study conducted in the 1960s contrasted states with high prices for alcohol to states with low alcohol prices. New York State Moreland Commission on the Alcoholic Beverage Control Law, *Report and Recommendations No. 3* (January 21, 1964). The study analyzed annual rates of alcoholism, drunk driving, public drunkenness arrests, and other factors and concluded that "artificially high prices for liquor have no substantial relationship to temperance." *Id.* at 19. A 1985 Federal Trade Commission report also found no causal link between alcohol advertising and increased levels of alcohol consumption. *See* Ekelund, Jr. & Saurman, *Advertising and the Market Process: A Modern Economic View* 149 (1988).

Although price advertising does not increase consumer demand for alcoholic beverages, it usually leads to

one thing all consumers desire: lower prices. Most alcohol retailers distribute the same spectrum of products. Admittedly, some alcohol stores may specialize in hard-to-find or imported liquors or wines. But in most alcoholic beverage stores, one will always be able to find a fifth of Jack Daniels, a bottle of chardonnay or a case of Budweiser. One of the only competitive factors between alcohol stores, apart from convenience or selection, is price. Rhode Island, through its price advertising prohibition, eliminates the primary competitive mechanism in the retail alcohol market.

If price advertising of alcohol does not cause increased levels of alcohol consumption, one may legitimately ask why liquor stores, including petitioners in the instant case, wish to advertise price information. The answer is that price advertising acts as an "allocator of demands" among stores or brands within a particular industry. *Id.* at 148. In other words, consumers do not buy more alcohol due to lower prices, but rather will choose those stores or brands with the lowest prices. By prohibiting alcohol retailers from advertising their prices, Rhode Island consumers do not know which stores have the best prices of their preferred brands of alcoholic beverages. Under the price advertising ban, Rhode Island consumers are the ultimate losers. They are currently in a market position of "less information, reduced choice and a strong likelihood of higher prices." *See id.* at 150.[1]

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[1] One of the ironic twists of the instant case is that Rhode Island ranks in the top 30 percent of states in per capita alcohol consumption even with its 39 year-old price advertising prohibition. *See* Petition for Writ of Certiorari, 44 *Liquormart v. State of Rhode Island* at 23.

It is apparent from even a cursory glance at the record of the instant case that another motivation underlies Rhode Island's price advertising ban: economic protectionism of the most obvious and egregious variety. It is not uncommon for seemingly benevolent legislation to be rooted in attempts by some private parties to gain personal advantage through the political process at the expense of others. Public choice economists have labeled such behavior "rent-seeking." Buchanan, Tollison, & Tullock, *Toward a Theory of a Rent-Seeking Society* (1981) (containing definitive treatment of rent-seeking and its origins and effects upon a democratic society).

Often, rent-seeking is hidden and one must search and, at times, speculate as to the special interest motivations that underlie supposed public-regarding legislation. In the instant case, the special interests supporting the price prohibition are readily apparent from the caption of the case. The Rhode Island Liquor Store Association was granted intervenor status as co-defendant with the State of Rhode Island. The Association is made up of smaller liquor stores who wholeheartedly support the price advertising prohibition. The Association claims that if the prohibition were overturned, its members "would be obliged to participate in the advertising arena and would be at a definite disadvantage when matched up against retailers who hold multiple licenses." 44 *Liquormart*, 39 F.3d at 6. Furthermore, the Association claims that competitive price advertising would tend to lower prices and that a "more competitive market for alcohol might be considered an undesirable goal."[2] *Id.*

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[2] It is not surprising to find the Association wrapping its purely self-interested motivations for supporting the advertising

The prohibition on price advertising is a classic example of a special interest policy, one that "generates substantial personal benefits for a small number of constituents while imposing a small individual cost on a large number of other[s]." Gwartney, "Public Choice and the Conduct of Representative Government," *Public Choice and Constitutional Economics* 1, 19 (Gwartney & Wagner eds. 1988). Under special interest legislation, the benefits to certain private parties are highly concentrated, while the costs are widely diffused. In other words, a few parties "benefit a great deal while almost everyone loses a little bit." *Id.* In the instant case, the liquor stores directly benefit from not having to offer competitive prices in order to attract customers. Of course, the costs to Rhode Island consumers in higher alcohol prices are spread out and largely hidden, yet they are no less real. Furthermore, unlike the Association's lobbying and litigation efforts, Rhode Island consumers have no rational incentive to organize and oppose the advertising prohibition. The costs for doing so would be extremely high while the payoff, in the form of lower alcohol prices, would not make the effort a rational choice.

The Founders recognized the problem of special interest legislation or "faction" and sought to curtail abuse of the legislative process through constitutional restraints. *See The Federalist* No. 10 (Madison). The First Amendment to the United States Constitution, no less

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prohibition in the shroud of public interest justifications. It borders on the absurd, however, for the Association to express concern for promoting temperance when its members' livelihoods are based upon public demand for alcoholic beverages.

than other provisions of the Constitution, serves as a check on both majoritarian and special interest abuses. This Court sought to curb these abuses of the democratic system in *Virginia State Board* by rejecting on First Amendment grounds a Virginia law that forbade pharmacists from advertising the prices of prescription drugs. *Virginia State Board*, 425 U.S. at 769-70. The purpose of the Virginia law was to encourage the use of smaller pharmacies by depriving consumers of information that those pharmacies were more expensive. This Court held that the pharmacies could not be insulated from competition by keeping consumers in the dark and depriving them of information that could be used for making better economic decisions. Likewise, the Rhode Island Liquor Store Association should not be permitted to use the power of the state to further its members' economic interests at the expense of petitioners and Rhode Island consumers.

III. COMMERCIAL SPEECH SHOULD BE GRANTED THE SAME PROTECTION UNDER THE FIRST AMENDMENT AS OTHER FORMS OF SPEECH AND EXPRESSION.

It is beyond dispute that commercial speech is entitled to constitutional protection under the First Amendment. *Rubin v. Coors Brewing Company*, 115 S.Ct. 1585 (1995); *Edenfield v. Fane*, 113 S.Ct. 1792 (1993); *City of Cincinnati v. Discovery Network, Inc.*, 113 S.Ct. 1505 (1993); *Virginia State Board, supra*. Furthermore, this Court has recognized that the information at issue in the instant case – truthful, non-misleading commercial information – is entitled to the highest degree of protection afforded

commercial speech. *Edenfield*, 113 S.Ct. at 1797. A four-part test was established by this Court for reviewing commercial speech restrictions in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of N.Y.*, 447 U.S. 557, 566 (1980):

> For commercial speech to come within [the First Amendment], it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than necessary to serve that interest.

Despite the strictures of the *Central Hudson* test, the United States Court of Appeals for the First Circuit relied on "warrantable inferences" in determining that Rhode Island's price advertising prohibition directly advanced the state's purported interest in promoting temperance. *44 Liquormart*, 39 F.3d at 6. Furthermore, the appeals court held that the state was entitled to a "reasonable choice" under *Central Hudson*'s fourth prong. *Id.* at 7. Accordingly, it upheld the prohibition under the third and fourth prongs of the *Central Hudson* test.[3]

The appeals court essentially adopted "rational basis" review for commercial speech restrictions. This holding not only clearly conflicts with the decisions of other circuit courts, but it also guts the protections for

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[3] The first and second prongs of the *Central Hudson* test are not at issue in the instant case. The parties agreed that the price information petitioners seek to advertise is truthful and that the state has a substantial interest in promoting temperance.

commercial speech recognized by this Court for two decades. The misapplication of the *Central Hudson* test by the appeals court is addressed below.[4]

In contrast to the First Circuit's approach, at least two circuits have recently reached opposite conclusions

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[4] In applying the *Central Hudson* test, the appeals court also inappropriately relied on the Twenty-First Amendment to ratchet down the government's burden of proof under the third and fourth prongs of the test. In its opinion, the court misconstrued prior decisions by this Court concerning the Twenty-First Amendment. As this Court has recognized: "Neither the text nor the history of the Twenty-First Amendment suggests that it qualifies individual rights protected by the Bill of Rights and the Fourteenth Amendment where the sale or use of liquor is concerned." *Craig v. Boren*, 429 U.S. 190, 206 (1976) (striking down law that established different legal drinking ages for men and women).

In applying the intermediate scrutiny test in *Craig*, this Court held that the Twenty-First Amendment did not affect the government's burden of proof for showing that classifications by gender were substantially related to the achievement of important governmental objectives. *Craig*, 429 U.S. at 209. Similarly, this Court held in *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 122 (1982), that the Twenty-First Amendment did not modify the government's burden of proof under the *Lemon v. Kurtzman*, 403 U.S. 602 (1972), test in Establishment Clause cases. Applying this Court's reasoning to the commercial speech context, the Twenty-First Amendment cannot be used to reduce the government's burden to prove, under *Central Hudson*, that its regulation directly advances the governmental interests asserted and is not more extensive than necessary to serve that interest. While the amendment may be used to demonstrate Rhode Island's substantial state interest in promoting temperance, it does not relieve the state of its burden to prove that the price advertising ban directly advances the state's interest in temperance in a manner no more restrictive of free speech than necessary.

and adopted markedly different tests for determining the level of constitutional protection afforded commercial speech under the third and fourth prongs of *Central Hudson*. The Ninth Circuit held that the United States Department of Agriculture's (USDA) almond marketing program, which required almond handlers either to advertise according to regulations or contribute an assessment fee to the California Almond Board, violated the third and fourth prongs of the *Central Hudson* test. *Cal-Almond, Inc. v. United States Dep't of Agriculture*, 14 F.3d 429 (9th Cir. 1993). The USDA claimed that the almond marketing program was necessary to provide for greater stability in agricultural products and to protect the income of farmers.

Relying on this Court's decision in *Edenfield*, the Ninth Circuit held that the burden fell on the USDA to justify its program by presenting evidence sufficient to meet the third prong of the *Central Hudson* test. Because the USDA conducted no studies concerning almond advertising, the court held that the program did not "directly advance" the asserted governmental interests. Furthermore, the USDA did not present any evidence that companies would spend less money on advertising in the absence of a mandatory contribution program. The court also found that the program violated the fourth prong of *Central Hudson* by declaring that "restrictions which disregard far less restrictive and more precise means are not narrowly tailored." *Cal-Almond*, 14 F.3d at 440. Accordingly, both the advertising regulation and the mandatory contribution program were struck down as unconstitutional restrictions on commercial free speech rights.

Likewise, the Fifth Circuit held that the City of Dallas could not, consistent with the First Amendment, restrict the advertising of "Class D Dance Halls." *MD II Entertainment, Inc. v. City of Dallas*, 28 F.3d 492 (5th Cir. 1994). The city claimed that it adopted advertising restrictions on topless bars to combat decreasing property values and increasing crime. Again, the city produced no studies showing a link between advertising and decreased property values or increased crime. *Id.* at 496. Therefore, the restrictions flunked the third prong of *Central Hudson*. Furthermore, the court found that the restrictions were overly broad in violation of *Central Hudson*'s fourth prong because they prohibited language that has never been alleged to cause reductions in property values or lead to increased crime. *Id.* at 496-97.

This Court in *Edenfield*, 113 S.Ct. at 1800, held that the government's burden under the third prong of *Central Hudson* "is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." Significantly, Rhode Island, like the USDA and the City of Dallas, produced absolutely no empirical evidence demonstrating that the price advertising ban will "alleviate to a material degree" alcohol consumption and thereby directly advance the state's interest in temperance. *See Edenfield*, 113 S.Ct. at 1800. Indeed, as set forth in Section II, studies show that alcohol price advertising has *no* effect on alcohol consumption. Clearly, the appeals court's reliance on "warrantable inferences" to uphold the price advertising prohibition is insufficient under the

third prong of the *Central Hudson* test and Rhode Island has failed to show that its ban "directly advances" its interest in temperance.

In examining the fourth prong of *Central Hudson*, the appeals court in the instant case justified its extremely lax standard of review by focusing on this Court's occasional use of the term "reasonable" in describing the necessary fit between governmental interests and the means chosen to advance those interests. *See Board of Trustees of State University of New York v. Fox*, 492 U.S. 469 (1989); *Posadas De Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986). Although this Court in *Fox* announced that the reasonable fit test is "far different, of course, from the 'rational basis' test," *Fox*, 492 U.S. at 480, the appeals court interpreted the *Fox* language to essentially mandate "rational" basis review for commercial speech regulations.

It is imperative that this Court make clear that neither *Fox* nor *Posadas* permits courts to grant such a high degree of deference to states in imposing commercial speech restrictions. Furthermore, this Court should establish a standard for commercial speech restrictions that was suggested in *Discovery Network* and *Edenfield*: "[A] regulation that suppresses truthful commercial speech to serve some other governmental purpose" (such as health, safety, and welfare concerns) should be subject to strict scrutiny review. *Discovery Network*, 113 S.Ct at 1518 (Blackmun, J., concurring); *see also Edenfield*, 113 S.Ct. at 1804 (Blackmun, J., concurring). Accordingly, commercial speech regulations that regulate or suppress truthful information can only be upheld if they are the least

restrictive means for advancing governmental health, safety and welfare interests.[5]

Applying the strict scrutiny standard to the facts of the instant case renders the price advertising prohibition unconstitutional. As petitioners showed in the lower courts, the state has a number of less restrictive alternatives available to combat alcohol consumption, or any increase in alcohol consumption caused by lower prices. Such alternatives include taxing alcoholic beverages at a higher rate or setting minimum alcohol prices. Although these means may not be economically desirable and *amicus* would not endorse either from a public policy perspective, the fact that less restrictive alternatives exist invalidates the price advertising restriction. Accordingly, Rhode Island's law does not pass constitutional muster under the fourth prong of *Central Hudson*.[6]

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[5] This test would reinforce *Central Hudson*'s requirement that a commercial speech regulation be "no more extensive than necessary" to further governmental interests. This requirement would eliminate once and for all any concern that either *Fox* or *Posadas* weakened the protection afforded commercial speech under the First Amendment.

Of course, adoption of a strict scrutiny standard for restrictions on truthful commercial information would still allow the government to regulate misleading or coercive speech. The government could also regulate the time, place, and manner of commercial speech. Such restrictions could be reviewed either under intermediate or rational basis review. *See Discovery Network*, 113 S.Ct. at 1517.

[6] Even if this Court were to reject strict scrutiny and apply the "reasonable fit" test articulated in *Fox* and *Posadas*, Rhode Island's prohibition on price advertising cannot withstand scrutiny under the fourth prong of the *Central Hudson* test. As set forth above, the prohibition flagrantly violates the third prong

CONCLUSION

Rhode Island's restriction on advertising the price of alcoholic beverages is, at bottom, a policy of "consumer ignorance." *See Coors Brewing*, 115 S.Ct. at 1597. A government policy that keeps consumers in the dark, and prevents producers from providing truthful information, runs directly counter to the First Amendment and the glorious tradition of free speech and open inquiry in this country. Rhode Island's price advertising ban prohibits information that is essential to a well-functioning market economy. Even worse, the maintenance of the policy is directly at the behest of an interest group that seeks to preserve the status quo for its own economic benefit. As Justice Stevens declared in *Coors Brewing*, the "Constitution is most skeptical of supposed state interests that seek to keep people in the dark for what the government believes to be their own good." *Id.* at 1597. This Court should lift the veil of ignorance cast over Rhode Island consumers by the state and the Rhode Island Liquor Store Association by striking down the price advertising ban.

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of *Central Hudson*. Moreover, as the majority opinion made clear in *Coors Brewing*, 115 S.Ct. at 1593-94, the availability of other options, all of which could advance governmental interests in ways less intrusive of First Amendment rights, establishes that the price advertising ban is more extensive than necessary. Therefore, no matter what standard of scrutiny is adopted by this Court, the price advertising prohibition in the instant case cannot be upheld. *See Coors Brewing*, 115 S.Ct. at 1597 (Stevens, J. concurring) ("the Government's asserted interest, that consumers should be . . . uninformed for their own protection, does not suffice to justify restrictions on protected speech in *any* context, whether under 'exacting scrutiny' or some other standard") (emphasis in original).

For all the foregoing reasons, *amicus curiae* Institute for Justice respectfully requests that this honorable Court reverse the opinion below.

Respectfully submitted,

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Date: June 26, 1995

Supreme Court, U.S.
FILED
JUN 30 1995
OFFICE OF THE CLERK

No. 94-1140

(6)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

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44 LIQUORMART, INC. and
PEOPLES SUPER LIQUOR STORES, INC.,
Petitioners,

v.

STATE OF RHODE ISLAND, and
RHODE ISLAND LIQUOR STORES ASSOCIATION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED DECEMBER 27, 1994
CERTIORARI GRANTED MAY 1, 1995

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143 pp

TABLE OF CONTENTS

	Page
DOCKET ENTRIES—U.S. District Court—District of Rhode Island	1
DOCKET ENTRIES—U.S. Court of Appeals Case No. 93-1893	12
DOCKET ENTRIES—U.S. Court of Appeals Case No. 93-1927	20
COMPLAINT	28
ANSWER	38
INTERVENORS MEMORANDUM OF LAW	43
STIPULATION	46
LIQUOR ADVERTISEMENT	49
SHOW CAUSE HEARING DOUGLAS LIQUORS INC.	51
EXCERPT FROM U.S. DISTRICT COURT TRIAL TRANSCRIPT	67
DEPOSITION EXCERPTS OF HENRY SAFFER, Ph.D.	69
DEPOSITION EXCERPTS OF DR. REGINALD GEORGE SMART	75
DEPOSITION EXCERPTS OF DAVID J. PITTMAN, Ph.D.	83
"THE EFFECT OF PRICE ADVERTISING ON ALCOHOLIC BEVERAGE SALES", *By Gary Wilcox*	86
"ALCOHOLIC CONTROL LAWS AND THE CONSUMPTION OF DISTILLED SPIRITS AND BEER", *By Stanley I. Ornstein & Dominique M. Hanssens*	94
"STATE MONOPOLIES AND ALCOHOLIC BEVERAGE CONSUMPTION", *By Jon P. Nelson*	122

U.S. DISTRICT COURT
DISTRICT OF RHODE ISLAND
(Providence)

Civil Docket for Case #: 92-CV-115

44 LIQUORMART, INC., *et al.*

v.

RACINE
Assigned to: Judge Raymond J. Pettine

DOCKET ENTRIES

DATE	No.	PROCEEDINGS
2/28/92	1	COMPLAINT filed; FILING FEE $120.00 RECEIPT #25201 (pd) [Entry date 03/02/92]
2/28/92	—	SUMMONS(ES) issued (pd) [Entry date 03/02/92]
3/2/92	—	CASE REFERRED to Magistrate Judge Jacob Hagopian (pd)
3/9/92	2	MOTION by 44 Liquormart, Inc., Peoples Super Liquor for Betsy G. Roberti to Appear Pro Hac Vice (cz)
3/9/92	3	MOTION by 44 Liquormart, Inc., Peoples Super Liquor for Evan T. Lawson to Appear Pro Hac Vice (cz)
3/19/92	4	RETURN OF SERVICE executed as to Kate F. Racine 3/12/92 Answer due on 4/1/92 for Kate F. Racine (pd) [Entry date 03/20/92]

DATE	No.	PROCEEDINGS
3/23/92	5	ANSWER to Complaint by Kate F. Racine (Attorney Rebecca Tedford Partington), (pd) [Entry date 03/25/92]
3/26/92	—	Motion(s) referred: [3-1] motion for Evan T. Lawson to Appear Pro Hac Vice referred to Magistrate Judge Jacob Hagopian, [2-1] motion for Betsy G. Roberti to Appear Pro Hac Vice referred to Magistrate Judge Jacob Hagopian (pd)
4/8/92	6	AMENDED ANSWER to Complaint by Kate F. Racine: amends [5-1] answer (pd) [Entry date 04/13/92]
4/13/92	7	ORDER granting [2-1] motion for Betsy G. Roberti to Appear Pro Hac Vice (signed by Magistrate Judge Timothy M. Boudewyns) (jh) [Entry date 04/14/92]
4/13/92	8	ORDER granting [3-1] motion for Evan T. Lawson to Appear Pro Hac Vice (signed by Magistrate Judge Timothy M. Boudewyns) (jh) [Entry date 04/14/92]
4/17/92	9	MOTION to Intervene by RI Liquor Store Association (cz)
4/24/92	—	Pre-trial conference set before Magistrate Judge Hagopian at 11:30 5/12/92 (cl)
5/5/92	—	Motion(s) referred: [9-1] motion to Intervene by RI Liquor Store Association referred to Judge Raymond J. Pettine (pd)
5/6/92	—	RECEIVED from Betsy G. Roberti and Evan T. Lawson $40.00 for admission pro hac vice. Receipt #25667 (cz)
5/6/92	10	Stipulation: Plaintiff may have up to and including 5/20/92 to respond to the Motion to Intervene. (cz)

DATE	No.	PROCEEDINGS
5/12/92	11	SCHEDULING ORDER setting Discovery cutoff 8/12/92; Pretrial Memorandum Deadline 8/26/92; (signed by Magistrate Judge Jacob Hagopian) (cl)
5/12/92	12	ORDER granting [9-1] motion to Intervene by RI Liquor Store Association (signed by Judge Raymond J. Pettine) (cz)
5/12/92	—	Motion(s) no longer referred: [9-1] motion to Intervene by RI Liquor Store Association (cz)
5/12/92	13	OBJECTION by 44 Liquormart, Inc. to [9-1] motion to Intervene by RI Liquor Store Association (pd) [Entry date 05/13/92]
5/14/92	14	MOTION by 44 Liquormart, Inc., Peoples Super Liquor to Vacate [12-1] order (cz) [Entry date 05/19/92]
6/3/92	15	ENTRY of appearance for RI Liquor Store by William P. Gasbarro (cz) [Entry date 06/05/92]
6/4/92	16	NOTICE of by 44 Liquormart, Inc., Peoples Super Liquor of Withdrawal of Appearance of Betsy G. Roberti. The appearance of Evan T. Lawson of this firm remains in effect. (cz) [Entry date 06/05/92]
6/10/92	—	Motion(s) referred: [14-1] motion to Vacate [12-1] order referred to Judge Raymond P. Pettine (pd)
6/16/92	17	ORDER granting [14-1] motion to Vacate [12-1] order. The m/intervene is referred to the Mag. Judge for disposition (signed by Judge Raymond P. Pettine) (pd)
6/25/92	—	Motion hearing re: [9-1] motion to Intervene by RI Liquor Store Association at 11:00 7/14/92 before Magistrate Judge Hagopian (cl)

DATE	No.	PROCEEDINGS
7/8/92	18	ANSWER to Complaint by RI Liquor Store (Attorney), (pd)
7/16/92	19	NOTICE by Kate F. Racine to take deposition of People's Super Liquor Stores, Inc. (cz) [Entry date 07/17/92]
7/27/92	20	MOTION by 44 Liquormart, Inc., Peoples Super Liquor to Strike Affirmative Defense of Intervenor. (cz) [Entry date 07/28/92]
7/31/92	21	ORDER granting motion to intervene (signed by Magistrate Judge Jacob Hagopian) (cl)
7/31/92	22	MOTION by Kate F. Racine to Compel Discovery. (cz) [Entry date 08/04/92]
8/11/92	23	OBJECTION by RI Liquor Store to [20-1] motion to Strike Affirmative Defense of Intervenor. (cz) [Entry date 08/14/92]
8/12/92	24	MOTION by Kate F. Racine for Summary Judgment (cz) [Entry date 08/17/92]
8/12/92	25	AFFIDAVIT of Philip J. Cook, Ph.D Re: [24-1] motion for Summary Judgment (cz) [Entry date 08/17/92]
8/12/92	26	AFFIDAVIT of George H. Borts Re: [24-1] motion for Summary Judgment (cz) [Entry date 08/17/92]
8/12/92	27	AFFIDAVIT by Kate F. Racine Re: [24-1] motion for Summary Judgment (cz) [Entry date 08/17/92]
8/12/92	28	AFFIDAVIT of Henry Saffer Re: [24-1] motion for Summary Judgment (cz) [Entry date 08/17/92]
8/12/92	29	Defendant's Statement of Undisputed Facts in Support of Defendant's Motion for Summary Judgment. (cz) [Entry date 08/17/92]
8/12/92	30	MOTION by RI Liquor Store for Order Compelling Discovery. (cz) [Entry date 08/17/92]

DATE	No.	PROCEEDINGS
8/13/92	31	OBJECTION by 44 Liquormart, Inc. to [30-1] motion for Order Compelling Discovery. (cz) [Entry date 08/17/92]
8/17/92	32	MOTION by Kate F. Racine to Stay (cz)
8/20/92	—	Motion(s) referred: [22-1] motion to Compel Discovery. referred to Magistrate Judge Timothy M. Boudewyns, [20-1] motion to Strike Affirmative Defense of Intervenor. referred to Magistrate Judge Timothy M. Boudewyns (pd)
8/25/92	33	OBJECTION by 44 Liquormart, Inc. Peoples Super Liquor to [24-1] motion for Summary Judgment (cz)
8/25/92	33	MOTION by 44 Liquormart, Inc., Peoples Super Liquor for Summary Judgment (cz)
8/25/92	34	PLAINTIFFS' Statement of Genuine Issues of Fact in Support of Their Opposition to Defendant's Motion for Summary Judgment and Statement of Undisputed Facts in Support of Their Cross Motion for Summary Judgment. (cz)
8/25/92	35	AFFIDAVIT of Dr. Dadvid J. Pittman by 44 Liquormart, Inc., Peoples Super Liquor Re: [33-1] motion for Summary Judgment, [33-1] motion response (cz) [Edit date 08/25/92]
8/25/92	36	AFFIDAVIT Reginald G. Smart by 44 Liquormart, Inc., Peoples Super Liquor Re: [33-1] motion for Summary Judgment, [33-1] motion response (cz)
8/25/92	37	OBJECTION by 44 Liquormart, Inc., Peoples Super Liquor to [30-1] motion for Order Compelling Discovery. (cz)

DATE	No.	PROCEEDINGS
8/26/92	—	Status conference set at 11:00 9/8/92 before Mag. Judge Boudewyns on Deft, Racine's m/ for order compelling disc. and Pltf's m/ to strike aff. defense of intervenor. (jh)
9/4/92	—	Motion(s) referred: [30-1] motion for Order Compelling Discovery. referred to Magistrate Judge Timothy M. Boudewyns (pd)
9/4/92	—	Motion(s) referred: [33-1] motion for Summary Judgment referred to Judge Raymond J. Pettine, [32-1] motion to Stay referred to Judge Raymond J. Pettine (pd)
9/8/92	38	Minute entry: Hearing held before Mag. Judge Boudewyns. Deft, Racine's m/ for order compelling disc. is DENIED. Pltfs' m/ to strike affirmative defense of intervenor is DENIED. (jh) [Entry date 09/09/92]
9/8/92	39	ORDER denying [20-1] motion to Strike Affirmative Defense of Intervenor. (signed by Magistrate Judge Timothy M. Boudewyns) (jh) [Entry date 09/09/92]
9/8/92	40	ORDER denying [22-1] motion to Compel Discovery. (signed by Magistrate Judge Timothy M. Boudewyns) (jh) [Entry date 09/09/92]
9/11/92	41	ORDER granting [32-1] motion to Stay PTO pending resolution of the m/SJ. (signed by Judge Raymond J. Pettine) (pd)
9/14/92	—	Status conference set at 10:30 10/8/92 before Mag. Judge Boudewyns on M/ for order compelling discovery. (jh)
9/18/92	42	TRANSCRIPT of proceeding held on 7/14/92 before Mag. Judge Hagopian. (cz) [Entry date 09/21/92]

DATE	No.	PROCEEDINGS
9/23/92	—	Motion hearing re: [33-1] motion for Summary Judgment at 10:00 10/2/92, [24-1] motion for Summary Judgment at 10:00 10/2/92. Notice sent to all counsel of record (pd)
9/25/92	43	DEFT's rule 12 statement of undisputed facts in support of deft's obj. to m/SJ (pd) [Entry date 09/29/92]
9/29/92	44	OBJECTION by Kate F. Racine to [33-1] motion for Summary Judgment (cz) [Entry date 10/01/92]
10/2/92	—	Motion hearing re: [33-1] motion for Summary Judgment Motion hearing held, [24-1] motion for Summary Judgment Motion hearing held—Evan Lawson, Esq., Barry Kusinitz, Esq., Rebecca Partington, Esq., Robert Brady, Esq., William Gasbarro, Esq.—Counsel argue to the Court. It is decided that this matter be set for evidentiary hearing on 11/16/92 at 9:30 a.m. Mr. Lawson to prepare order. (cz)
10/2/92	45	Minute entry—Hearing held on 10/2/92. (cz)
10/8/92	46	Minute entry: Hearing held before Mag. Judge Boudewyns. Motion for order compelling discovery is denied. (jh)
10/8/92	47	ORDER denying [30-1] motion for Order Compelling Discovery. (signed by Magistrate Judge Timothy M. Boudewyns) (jh)
10/30/92	48	ORDER, reset Pretrial Memorandum Deadline to 11/9/92, and set Bench Trial for 11/16/92 (signed by Judge Raymond J. Pettine) (pd)
10/30/92	49	MOTION by 44 Liquormart, Inc., Peoples Super Liquor To Take Depositions by Video Tape. (cz) [Entry date 11/03/92]

DATE	No.	PROCEEDINGS
10/30/92	50	MOTION by 44 Liquormart, Inc., Peoples Super Liquor To Shorten Time to Respond to Plaintiff's Motion to Take Depositions by Video Tape. (cz) [Entry date 11/03/92]
11/2/92	51	MOTION by Kate F. Racine to Reopen Discovery (cz) [Entry date 11/03/92]
11/2/92	52	MOTION by Kate F. Racine to Continue Trial (cz) [Entry date 11/03/92]
11/2/92	54	OBJECTION by RI Liquor Store to [49-1] motion To Take Depositions by Video Tape. (cz) [Entry date 11/03/92]
11/2/92	55	MOTION by RI Liquor Store to Continue Trial (cz) [Entry date 11/03/92]
11/2/92	56	OBJECTION by RI Liquor Store to [50-1] motion To Shorten Time to Respond to Plaintiff's Motion to Take Depositions by Video Tape. (cz) [Entry date 11/03/92]
11/2/92	57	MOTION by RI Liquor Store to Compel Request for Production (cz) [Entry date 11/03/92]
11/3/92	53	OBJECTION by Kate F. Racine to [49-1] motion To Take Depositions by Video Tape. (cz)
11/3/92	58	Minute entry: Hearing held before mag. Judge Boudewyns. Intevenor's m/ for req. for prod. is passed for comp. Motion to shorten time to resp. to pltf's m/ to take depo by video tape is passed as moot. Motion to reopen disc. is partially granted. Intevenor's m/ to cont. is den. M/ for contin. is den. (cz) [Entry date 11/10/92]
11/3/92	59	ORDER mooting [57-1] motion to Compel Request for Production (signed by Magistrate Judge Timothy M. Boudewyns) (cz) [Entry date 11/10/92]

DATE	No.	PROCEEDINGS
11/3/92	60	ORDER mooting [50-1] motion To Shorten Time to Respond to Plaintiff's Motion to Take Depositions by Video Tape. (signed by Magistrate Judge Timothy M. Boudewyns) (cz) [Entry date 11/10/92]
11/3/92	61	ORDER granting in part [51-1] motion to Reopen Discovery (signed by Magistrate Judge Timothy M. Boudewyns) (cz) [Entry date 11/10/92]
11/3/92	62	ORDER denying [55-1] motion to Continue Trial (signed by Magistrate Judge Timothy M. Boudewyns) (cz) [Entry date 11/10/92]
11/3/92	63	ORDER denying [52-1] motion to Continue Trial (signed by Magistrate Judge Timothy M. Boudewyns) (cz) [Entry date 11/10/92]
11/5/92	64	ORDER (consolidated version of 11/3/92 orders (signed by Magistrate Judge Timothy M. Boudewyns) (cz) [Entry date 11/10/92]
11/16/92	65	Stipulation entered. (pd) [Entry date 11/18/92]
3/11/93	—	Evidentiary hearing held—Evan Lawson, Esq., Barry Kusinitz, Esq., Rebecca Partington, Esq., William Gasbarro, Esq. and Robert Brady, Esq. Plaintiff waives opening statement. W.1 Reginald George Smart (videotape depo.) Court indicates it would rather read deposition transcripts instead of watching videotape. Briefs due 3 weeks following receipt of transcript. Reply briefs due one week thereafter. Briefs are limited to 30 pgs. Intervenor to join in defendant's brief. Seven exhibits. (cz) [Entry date 03/12/93]
3/16/93	66	TRANSCRIPT of proceedings held on 3/11/93. (cz) [Entry date 03/23/93]

DATE	No.	PROCEEDINGS
3/19/93	—	CASE assigned to Judge Raymond J. Pettine. Assigned to Magistrate Judge Timothy M. Boudewyns (jh)
4/1/93	67	MOTION by RI Liquor Store to Enlarge Time to 4/20/93 to file trial brief. (cz) [Entry date 04/02/93]
4/2/93	68	ORDER granting [67-1] motion to Enlarge Time to 4/20/93 to file trial brief., set Brief deadline to 4/20/93 (signed by Judge Raymond J. Pettine) (pd)
8/10/93	69	MEMORANDUM & ORDER: The Ct. holds that SEc. 3-8-7 & 3-8-8.1 of the RIGL and Reg. 32 of the RI Liquor Control Administration do not directly advance the State's interest in reducing overall consumption of alcohol in RI & are more extensive than necessary to serve the State's interest. I find that the statutes impermissibly restrict commercial speech and are unconstitutional. (signed by Judge Raymond J. Pettine) (pd)
8/10/93	10	JUDGMENT for 44 Liquormart, Inc., Peoples Super Liquor against Kate F. Racine in accordance with the Memo & Order entered on 8/10/93. Docketed on 8/12/93. (signed by Judge Raymond J. Pettine) (pd) [Entry date 08/12/93]
8/10/93	—	Case closed (pd) [Entry date 08/12/93]
8/13/93	71	NOTICE OF APPEAL by RI Liquor Store. Appeal record due on 9/12/93 (jb)
8/13/93	—	Notice of appeal and certified copy of docket as well as copy of the Memo and order dated 8/10/93 to USCA: [71-1] appeal by RI Liquor Store (jb)
8/13/93	—	Appeal fee of $105.00 paid on receipt #34511. (jb) [Entry date 08/16/93]

DATE		PROCEEDINGS
8/13/93	72	MOTION by RI Liquor Store to Stay (jb) [Entry date 08/16/93]
8/18/93	75	NOTICE of Docketing ROA from USCA Re: [71-1] appeal USCA Number: 93-1893 (jb) [Entry date 08/20/93]
8/19/93	73	Transcript of an in chambers conference filed. (jb) [Entry date 08/20/93]
8/19/93	74	NOTICE OF APPEAL by Kate F. Racine. Fee Status: $105.00 paid on receipt #26664. Appeal record due on 9/18/93 (jb) [Entry date 08/20/93]
8/19/93	76	MOTION by Kate F. Racine to Stay (jb) [Entry date 08/20/93]
8/19/93	77	MOTION by Kate F. Racine for substitution of parties (jb) [Entry date 08/20/93]
8/20/93	—	Notice of appeal and certified copy of docket to USCA: [74-1] appeal by Kate F. Racine (jb)
8/20/93	78	ORDER denying [76-1] motion to Stay, denying [72-1] motion to Stay. (3 page order faxed to counsel on 8/20 and the order w/attachment mailed on 8/20/93). (signed by Judge Raymond J. Pettine) (pd)
8/23/93	79	CERTIFICATE of Clerk (jb)
8/23/93	—	Notice of appeal and certified copy of docket, original pleadings, exhibits and 4 video cassetts to USCA: [74-1] appeal by Kate F. Racine (jb)

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 93-1893

44 LIQUORMART

v.

STATE OF RI, *et al.*

DOCKET ENTRIES

DATE	PROCEEDINGS
8/17/93	CIVIL case docketed. [91281-1] Notice filed by William P. Gasbarro for Appellant Rhode Island Liquor Stores Association, Robert M. Brady for Appellant Rhode Island Liquor Stores Association. Record on appeal due 8/27/93. (lina) [93-1893]
8/20/93	APPEARANCE filed by Attorney Evan T. Lawson on behalf of Plaintiffs Appellees 44 Liquormart. (lina) [93-1893]
8/23/93	APPEARANCE filed by Attorney William P. Gasbarro on behalf of Appellant Rhode Island Liquor Stores Association. (jant) [93-1893]
8/24/93	FEE PAID. Notice received from District Court that filing fee has been paid by the Appellant on 8/13/93. (eiln) [93-1893]
8/25/93	APPEARANCE filed by Attorney Robert M. Brady in 93-1893 on behalf of Appellant Rhode Island Liquor Stores Association in 93-1893. (paua) [93-1893]

DATE	PROCEEDINGS
8/30/93	RECORD ON APPEAL filed: 1 box of pleadings and exhibits. Appellant's Brief and Appendix Due 10/4/93. (lina) [93-1893]
8/31/93	APPEARANCE filed by Attorney Rebecca Tedford Partington in 93-1893 on behalf of Appellee Kate F. Racine in 93-1893. (lina) [93-1893]
9/7/93	MOTION by Kate F. Racine in 93-1893, Kate F. Racine in 93-1927 to consolidate for purposes of briefing and oral argument the following cases: 93-1893 and 93-1927 filed. Certificate of service dated 9/1/93. (lina) [93-1893 93-1927]
9/7/93	MEMORANDUM filed by Appellee Kate F. Racine in 93-1893 in support of motion to consolidate appeals 93-1893 and 93-1927. (lina) [93-1893]
9/7/93	ORDER: by Chief Judge Stephen G. Breyer ordering that the appeals 93-1893 and 93-1927 be consolidated. In 93-1893, 93-1927. (lina) [93-1893 93-1927]
10/1/93	MOTION filed for Appellant Rhode Island Liquor Stores Association in 93-1893, Appellant Kate F. Racine in 93-1927 requesting to extend time to file the respective briefs and appendices for Appellants' until 10/14/93. (lina) [93-1893 93-1927]
10/1/93	ORDER: by Judge Juan R. Torruella granting motion to extend time to file Appellants' respective briefs and appendices in 93-1893, 93-1927. Appellants' Appendices Now Due 10/14/93 in 93-1893, in 93-1927. Appellants' Briefs Now Due 10/14/93 for William P. Gasbarro in 93-1893, for Robert M. Brady in 93-1893, for Rebecca Tedford Partington in 93-1927. (lina) [93-1893 93-1927]
10/14/93	MOTION filed for Appellant Rhode Island Liquor Stores Association in 93-1893, Appellant Kate F. Racine in 93-1927 requesting to extend time to file Appellants respective briefs and appendices until 10/18/93. (lina) [93-1893 93-1927]

DATE	PROCEEDINGS
10/14/93	ORDER: by Judge Juan R. Torruella enlarging the time for Appellants' to file their respective briefs and appendices to and including October 18, 1993 in 93-1893, 93-1927. Appellants' Appendices Now Due 10/18/93 in 93-1893, in 93-1927. Appellants' Briefs Now Due 10/18/93 for William P. Gasbarro in 93-1893, for Robert M. Brady in 93-1893, for Rebecca Tedford Partington in 93-1927. (lina) [93-1893 93-1927]
10/14/93	ATTORNEY Lauren E. Jones for Appellant Rhode Island Liquor Stores Association in 93-1893, Attorney Lauren E. Jones for Appellant Kate F. Racine in 93-1927 added to case(s) [93-1893, 93-1927]. (lina) [93-1893 93-1927]
10/18/93	SUPPLEMENTAL RECORD consisting of pleading number 81 filed. (lina) [93-1893 93-1927]
10/20/93	APPELLANT'S BRIEF filed on behalf of Appellant Rhode Island Liquor Stores Association in 93-1893. Pages: 42, Copies: 10, delivered by mail. Certificate of service date 10/18/93. (bevy) [93-1893]
11/4/93	ATTORNEY Caroline C. Cornwell for Appellant Rhode Island Liquor Stores Association in 93-1893, Attorney Caroline C. Cornwell for Appellant State of Rhode Island in 93-1927 added to case(s) [93-1893, 93-1927]. (lina) [93-1893 93-1927]
11/4/93	APPEARANCE filed by Attorney Caroline C. Cornwell in 93-1893, Attorney Lauren E. Jones in 93-1893, Attorney Caroline C. Cornwell in 93-1927, Attorney Lauren E. Jones in 93-1927 on behalf of Appellant Rhode Island Liquor Stores Association in 93-1893, State of Rhode Island in 93-1927. (lina) [93-1893 93-1927]
11/24/93	BRIEF filed by Evan T. Lawson for Appellees 44 Liquormart in 93-1893, Evan T. Lawson for Ap-

pellees 44 Liquormart in 93-1927. Copies: 10. Certificate of service date 11/24/93. (lina) [93-1893 93-1927]

12/6/93 MOTION filed for Appellant Rhode Island Liquor Stores Association in 93-1893, Appellant State of Rhode Island in 93-1927 requesting to extend time to file Appellants reply brief until 12/21/93. (lina) [93-1893 93-1927]

12/6/93 ORDER: by Judge Norman H. Stahl enlarging the time for Appellants to file their reply brief to and including December 21, 1993. in 93-1893, 93-1927 (lina) [93-1893 93-1927]

12/20/93 MOTION filed for Appellant Rhode Island Liquor Stores Association in 93-1893, Appellant State of Rhode Island in 93-1927 requesting to extend time to file Appellants' reply brief until 1/5/94. (lina) [93-1893 93-1927]

12/20/93 ORDER: by Judge Norman H. Stahl enlarging the time for Appellants to file their reply brief to and including January 5, 1994 in 93-1893, 93-1927. (lina) [93-1893 93-1927]

12/28/93 APPELLANT'S REPLY BRIEF on behalf of Rhode Island Liquor Stores Association. Pages: 11. Copies: 10. Delivered by mail. Certificate of service date 12/21/93. (bevy) [93-1893 93-1927]

1/6/94 APPELLANT'S REPLY BRIEF on behalf of State of Rhode Island. Pages: 14. Copies: 10. Delivered by mail. Certificate of service date 1/5/94. (bevy) [93-1893 93-1927]

1/13/94 Assigned for hearing at the February, 1994 session. (ceca) [93-1893 93-1927]

1/18/94 MOTION filed for Appellant Rhode Island Liquor Stores Association in 93-1893, Appellant State of Rhode Island in 93-1927 requesting to change date of oral argument. (lina) [93-1893 93-1927]

DATE	PROCEEDINGS
1/18/94	ORDER: by Judge Conrad K. Cyr upon consideration of Appellants' motion to continue oral argument, ordering that said motion be denied. Appellant should have substitute counsel available to argue. in 93-1893, 93-1927 (lina) [93-1893 93-1927]
2/10/94	CASE ARGUED 02/10/94. Cyr, Aldrich, Stahl, JJ. (ceca) [93-1893 93-1927]
5/2/94	JUDGMENT: Terminated on the Merits after Oral Hearing; The judgment of the District Court is reversed in part and affirmed in part in accordance with the opinion issued this date. No costs.; Written, Signed, Published. Judge Bailey Aldrich, Authoring Judge; Judge Conrad K. Cyr; Judge Norman H. Stahl. (lina) [93-1893 93-1927]
5/16/94	Petition by State of Rhode Island in 93-1893, State of Rhode Island in 93-1927 for rehearing and suggestion for rehearing in banc filed. Certification of counsel pursuant to the Rules of the United States Court of Appeals for the First Circuit Rule 35 and 35.1 filed. Certificate of service dated 5/13/94. (lina) [93-1893 93-1927]
5/16/94	Petition by Rhode Island Liquor Stores Association in 93-1893 and in 93-1927 for rehearing and suggestion for rehearing in banc filed. Certificate of service dated 5/16/94. (lina) [93-1893 93-1927]
5/16/94	Petition by 44 Liquormart in 93-1893, 44 Liquormart in 93-1927 for rehearing and suggestion for rehearing en banc, filed. Certificate of service dated 5/16/94. (lina) [93-1893 93-1927]
7/8/94	ORDER: by Judge Bailey Aldrich, Judge Juan R. Torruella, Judge Bruce M. Selya, Judge Conrad K. Cyr, Judge Michael Boudin, Judge Norman H. Stahl denying the petitions for rehearing and the suggestions for rehearing en banc in 93-1893 and 93-1927. Chief Judge Stephen Breyer did not participate. (lina) [93-1893 93-1927]

DATE	PROCEEDINGS
7/8/94	ORDER: by Judge Conrad K. Cyr, Judge Bailey Aldrich, Judge Norman H. Stahl to vacate judgment of Court of Appeals entered on May 2, 1994. The panel opinion having been withdrawn in accordance with the judgment issued this date, ordering that either party may file a petition for rehearing with a suggestion for rehearing en banc by July 22, 1994. (lina) [93-1893 93-1927]
7/8/94	JUDGMENT: The judgment of this Court of May 2, 1994 is vacated and the opinion of that date is withdrawn. Affirmed (in part) and Reversed (in part); No costs. Written, Signed, Unpublished. Judge Bailey Aldrich, Authoring Judge; Judge Conrad K. Cyr; Judge Norman H. Stahl. (lina) [93-1893 93-1927]
7/20/94	Petition for Appellee 44 Liquormart Inc. for rehearing and suggestion for rehearing en banc in 93-1893 and in 93-1927 filed. Certificate of service dated 7/20/94. (lina) [93-1893 93-1927]
7/22/94	Petition by Rhode Island Liquor Stores Association in 93-1893, Rhode Island Iiquor Stores Association in 93-1927 for rehearing before original filed. Certificate of service dated 7/21/94. (lina) [93-1893 93-1927]
7/22/94	Petition by Rhode Island Liquor Stores Association in 93-1893 and in 93-1927 for rehearing in banc filed. Certificate of service dated 7/21/94. (lina) [93-1893 93-1927]
7/22/94	Memorandum in support of petition for rehearing and suggestion for rehearing in banc filed by Rhode Island Liquor Store Association. (lina) [93-1893]
7/22/94	ATTORNEY Alan M. Shoer for Appellee State of Rhode Island in 93-1893 and in 93-1927 added to case(s) [93-1893, 93-1927]. (lina) [93-1893 93-1927]

DATE	PROCEEDINGS
7/22/94	Petition by State of Rhode Island in 93-1893, State of Rhode Island in 93-1927 for rehearing and suggestion for rehearing in banc, filed. Certificate of service dated 7/21/94. (lina) [93-1893 93-1927]
7/29/94	ORDER: by Judge Bailey Aldrich, Judge Juan R. Torruella, Judge Bruce M. Selya, Judge Conrad K. Cyr, Judge Michael Boudin, Judge Norman H. Stahl. Denying the request of 44 Liquormart, Inc. for a panel rehearing and rehearing en banc. in 93-1893, 93-1927 (dona) [93-1893 93-1927]
10/24/94	ORDER: by Judge Conrad K. Cyr, Judge Bailey Aldrich, Judge Norman H. Stahl the petition for rehearing filed by Rhode Island Liquor Stores Association and the petition for rehearing by the State of Rhode Island are granted. The opinion of this Court of July 8, 1994 is withdrawn and this Court's judgment of July 8, 1994 is vacated. A new opinion and judgment will issue this date in 93-1893, 93-1927. (lina) [93-1893 93-1927]
10/24/94	JUDGMENT: Terminated on the Merits after Submission Without Oral Hearing; Reversed; Costs to Defendants; Written, Signed, Published. Judge Bailey Aldrich, Authoring Judge; Judge Conrad K. Cyr; Judge Norman H. Stahl. (lina) [93-1893 93-1927]
11/15/94	TAXATION of costs filed. (lina) [93-1893 93-1927]
11/15/94	MANDATE ISSUED. (lina) [93-1893 93-1927]
11/15/94	RECORD returned. (lina) [93-1893]
1/9/95	U.S. SUPREME COURT NOTICE filed regarding petition for writ of certiorari. Filed in the Supreme Court on 12/27/94. Supreme Court case number: 94-1140. (lina) [93-1893]
1/13/95	Opinion can be found in Federal Reporter 39 F.3d 5 (bevy) [93-1893]

DATE	PROCEEDINGS
5/4/95	U.S. SUPREME COURT ORDER granting petition for writ of certiorari limited to the following question: "Whether Rhode Island may, consistent with the First Amendment, prohibit truthful, non-misleading price advertising regarding alcoholic beverages?" filed in the Supreme Court on 5/01/95. (lina) [93-1893]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 93-1927

44 LIQUORMART

v.

STATE OF RI, *et al.*

DOCKET ENTRIES

DATE	PROCEEDINGS
8/25/93	CIVIL case docketed. [92267-1] Notice filed by Rebecca Tedford Partington for Appellant Kate F. Racine. Record on appeal due 9/7/93. (dona) [93-1927]
8/30/93	RECORD ON APPEAL filed: 1 box of pleadings and exhibits. Appellant's Brief and Appendix Due 10/4/93. (lina) [93-1927]
8/30/93	APPEARANCE filed by Attorney William P. Gasbarro in 93-1927 on behalf of Rhode Island Liquor Stores, Association. (lina) [93-1927]
8/31/93	APPEARANCE filed by Attorney Evan T. Lawson in 93-1927 on behalf of Plaintiff in 93-1927. (lina) [93-1927]
9/7/93	APPEARANCE filed by Attorney Rebecca Tedford Partington in 93-1927 on behalf of Appellant Kate F. Racine in 93-1927. (lina) [93-1927]

DATE	PROCEEDINGS
9/7/93	MOTION by Kate F. Racine in 93-1893, Kate F. Racine in 93-1927 to consolidate for purposes of briefing and oral argument the following cases: 93-1893 and 93-1927 filed. Certificate of service dated 9/1/93. (lina) [93-1893 93-1927]
9/7/93	MEMORANDUM filed by Appellant Kate F. Racine in support of motion to consolidate appeals 93-1893 and 93-1927. (lina) [93-1927]
9/7/93	ORDER: by Chief Judge Stephen B. Breyer ordering that the appeals 93-1893 and 93-1927 be consolidated. in 93-1893, 93-1927 (lina) [93-1893 93-1927]
9/8/93	APPEARANCE filed by Attorney Robert M. Brady in 93-1927 on behalf of Rhode Island Liquor Store Assoc. (lina) [93-1927]
10/1/93	MOTION filed for Appellant Rhode Island Liquor Stores Association in 93-1893, Appellant Kate F. Racine in 93-1927 requesting to extend time to file the respective briefs and appendices for Appellants' until 10/14/93. (lina) [93-1893 93-1927]
10/1/93	ORDER: by Judge Juan R. Torruella granting motion to extend time to file Appellants' respective briefs and appendices in 93-1893, 93-1927. Appellants' Appendices Now Due 10/14/93 in 93-1893, in 93-1927. Appellants' Briefs Now Due 10/14/93 for William P. Gasbarro in 93-1893, for Robert M. Brady in 93-1893, for Rebecca Tedford Partington in 93-1927. (lina) [93-1893 93-1927]
10/14/93	MOTION filed for Appellant Rhode Island Liquor Stores Association in 93-1893, Appellant Kate F. Racine in 93-1927 requesting to extend time to file Appellants respective briefs and appendices until 10/18/93. (lina) [93-1893 93-1927]
10/14/93	ORDER: by Judge Juan R. Torruella enlarging the time for Appellants' to file their respective

DATE	PROCEEDINGS
	briefs and appendices to and including October 18, 1993 in 93-1893, 93-1927. Appellants' Appendices Now Due 10/18/93 in 93-1893, in 93-1927. Appellants' Briefs Now Due 10/18/93 for William P. Gasbarro in 93-1893, for Robert M. Brady in 93-1893, for Rebecca Tedford Partington in 93-1927. (lina) [93-1893 93-1927]
10/14/93	ATTORNEY Lauren E. Jones for Appellant Rhode Island Liquor Stores Association in 93-1893, Attorney Lauren E. Jones for Appellant Kate F. Racine in 93-1927 added to case(s) [93-1893, 93-1927]. (lina) [93-1893 93-1927]
10/18/93	APPELLANT'S BRIEF and 2 volumes of APPENDIX filed on behalf of Kate F. Racine in 93-1927. Pages: 50, Copies: 10, delivered by mail. Certificate of service date 10/13/93. (bevy) [93-1927]
10/18/93	SUPPLEMENTAL RECORD consisting of pleading number 81 filed. (lina) [93-1893 93-1927]
11/4/93	ATTORNEY Carolina C. Cornwell for Appellant Rhode Island Liquor Stores Association in 93-1893, Attorney Carolina C. Cornwell for Appellant State of Rhode Island in 93-1927 added to case(s) [93-1893, 93-1927]. (lina) [93-1893 93-1927]
11/4/93	APPEARANCE filed by Attorney Carolina C. Cornwell in 93-1893, Attorney Lauren E. Jones in 93-1893, Attorney Caroline C. Cornwell in 93-1927, Attorney Lauren E. Jones in 93-1927 on behalf of Appellant Rhode Island Liquor Stores Association in 93-1893, State of Rhode Island in 93-1927. (lina) [93-1893 93-1927]
11/24/93	BRIEF filed by Evan T. Lawson for Appellees 44 Liquormart in 93-1893, Evan T. Lawson for Appellees 44 Liquormart in 93-1927. Copies: 10. Certificate of service date 11/24/93. (lina) [93-1893 93-1927]

DATE	PROCEEDINGS
12/6/93	MOTION filed for Appellant Rhode Island Liquor Stores Association in 93-1893, Appellant State of Rhode Island in 93-1927 requesting to extend time to file Appellants reply brief until 12/21/93. (lina) [93-1893 93-1927]
12/6/93	ORDER: by Judge Norman H. Stahl enlarging the time for Appellants to file their reply brief to and including December 21, 1993. in 93-1893, 93-1927 (lina) [93-1893 93-1927]
12/20/93	MOTION filed for Appellant Rhode Island Liquor Stores Association in 93-1893, Appellant State of Rhode Island in 93-1927 requesting to extend time to file Appellants' reply brief until 1/5/94. (lina) [93-1893 93-1927]
12/20/93	ORDER: by Judge Norman H. Stahl enlarging the time for Appellants to file their reply brief to and including January 5, 1994 in 93-1893, 93-1927. (lina) [93-1893 93-1927]
12/28/93	APPELLANT'S REPLY BRIEF on behalf of Rhode Island Liquor Stores Association. Pages: 11. Copies: 10. Delivered by mail. Certificate of service date 12/21/93. (bevy) [93-1893 93-1927]
1/6/94	APPELLANT'S REPLY BRIEF on behalf of State of Rhode Island. Pages: 14. Copies: 10. Delivered by mail. Certificate of service date 1/5/94. (bevy) [93-1893 93-1927]
1/13/94	Assigned for hearing at the February, 1994 session. (ceca) [93-1893 93-1927]
1/18/94	MOTION filed for Appellant Rhode Island Liquor Stores Association in 93-1893, Appellant State of Rhode Island in 93-1927 requesting to change date of oral argument. (lina) [93-1893 93-1927]
1/18/94	ORDER: by Judge Conrad K. Cyr upon consideration of Appellants' motion to continue oral argu-

DATE	PROCEEDINGS
	ment, ordering that said motion be denied. Appellant should have substitute counsel available to argue. in 93-1893, 93-1927 (lina) [93-1893 93-1927]
2/10/94	CASE ARGUED 02/10/94. Cyr, Aldrich, Stahl, JJ. (ceca) [93-1893 93-1927]
5/2/94	JUDGMENT: Terminated on the Merits after Oral Hearing; The judgment of the District Court is reversed in part and armed in part in accordance with the opinion issued this date. No costs.; Written, Signed, Published, Judge Bailey Aldrich, Authoring Judge; Judge Conrad K. Cyr; Judge Norman H. Stahl. (lina) [93-1893 93-1927]
5/16/94	Petition by State of Rhode Island in 93-1893, State of Rhode Island in 93-1927 for rehearing and suggestion for rehearing in banc filed. Certification of counsel pursuant to the Rules of the United States Court of Appeals for the First Circuit Rule 35 and 35.1 filed. Certificate of service dated 5/13/94. (lina) [93-1893 93-1927]
5/16/94	Petition by Rhode Island Liquor Stores Association in 93-1893 and in 93-1927 for rehearing and suggestion for rehearing in banc filed. Certificate of Service dated 5/16/94. (lina) [93-1893 93-1927]
5/16/94	Petition by 44 Liquormart in 93-1893, 44 Liquormart in 93-1927 for rehearing and suggestion for rehearing en banc, filed. Certificate of service dated 5/16/94. (lina) [93-1893 93-1927]
7/8/94	ORDER: by Judge Bailey Aldrich, Judge Juan R. Torruella, Judge Bruce M. Selya, Judge Conrad K. Cyr, Judge Michael Boudin, Judge Norman H. Stahl denying the petitions for rehearing and the suggestions for rehearing en banc in 93-1893 and 93-1927. Chief Judge Stephen Breyer did not participate. (lina) [93-1893 93-1927]

DATE	PROCEEDINGS
7/8/94	ORDER: by Judge Conrad K. Cyr, Judge Bailey Aldrich, Judge Norman H. Stahl the panel opinion having been withdrawn in accordance with the judgment issued today, and the amended panel opinion having been substituted, ordering that either party may file a petition for rehearing with a suggestion for rehearing en banc by July 22, 1994 in 93-1893, 93-1927. in 93-1893, 93-1927 (lina) [93-1927]
7/8/94	ORDER: by Judge Conrad K. Cyr, Judge Bailey Aldrich, Judge Norman H. Stahl to vacate judgment of Court of Appeals entered on May 2, 1994. The panel opinion having been withdrawn in accordance with the judgment issued this date, ordering that either party may file a petition for rehearing with a suggestion for rehearing en banc by July 22, 1994. (lina) [93-1893 93-1927]
7/8/94	JUDGMENT: The judgment of this Court of May 2, 1994 is vacated and the opinion of that date is withdrawn. Affirmed (in part) and Reversed (in part); No costs. Written, Signed, Unpublished. Judge Bailey Aldrich, Authoring Judge; Judge Conrad K. Cyr; Judge Norman H. Stahl. (lina) [93-1893 93-1927]
7/20/94	Petition for Appellee 44 Liquormart Inc. for rehearing and suggestion for rehearing en banc in 93-1893 and in 93-1927 filed. Certificate of service dated 7/20/94. (lina) [93-1893 93-1927]
7/22/94	Petition by Rhode Island Liquor Stores Association in 93-1893, Rhode Island Liquor Stores Association in 93-1927 for rehearing before original filed. Certificate of service dated 7/21/94. (lina) [93-1893 93-1927]
7/22/94	Petition by Rhode Island Liquor Stores Association in 93-1893 and in 93-1927 for rehearing in banc

DATE	PROCEEDINGS
	filed. Certificate of service dated 7/21/94. (lina) [93-1893 93-1927]
7/22/94	Memorandum in support of petition for rehearing and suggestion for rehearing in banc filed by Rhode Island Liquor Store Association. (lina) [93-1927]
7/22/94	ATTORNEY Alan M. Shoer for Appellee State of Rhode Island in 93-1893 and in 93-1927 added to case(s) [93-1893, 93-1927]. (lina) [93-1893 93-1927]
7/22/94	Petition by State of Rhode Island in 93-1893, State of Rhode Island in 93-1927 for rehearing and suggestion for rehearing in banc, filed. Certificate of service dated 7/21/94. (lina) [93-1893 93-1927]
7/29/94	ORDER: by Judge Bailey Aldrich, Judge Juan R. Torruella, Judge Bruce M. Selya, Judge Conrad K. Cyr, Judge Michael Boudin, Judge Norman H. Stahl. Denying the request of 44 Liquormart, Inc. for a panel rehearing and rehearing en banc. in 93-1893, 93-1927 (dona) [93-1893 93-1927]
10/24/94	ORDER: by Judge Conrad K. Cyr, Judge Bailey Aldrich, Judge Norman H. Stahl the petition for rehearing filed by Rhode Island Liquor Stores Association and the petition for rehearing by the State of Rhode Island are granted. The opinion of this Court of July 8, 1994 is withdrawn and this Court's judgment of July 8, 1994 is vacted. A new opinion and judgment will issue this date in 93-1893, 93-1927. (lina) [93-1893 93-1927]
10/24/94	JUDGMENT: Terminated on the Merits after Submission Without Oral Hearing; Reversed; Costs to Defendants; Written, Signed, Published. Judge Bailey Aldrich, Authoring Judge; Judge Conrad K. Cyr; Judge Norman H. Stahl. (lina) [93-1893 93-1927]

DATE	PROCEEDINGS
11/15/94	TAXATION of costs filed. (lina) [93-1893 93-1927]
11/15/94	MANDATE ISSUED. (lina) [93-1893 93-1927]
11/15/94	RECORD returned. (lina) [93-1927]
1/9/95	U.S. SUPREME COURT NOTICE filed regarding petition for writ of certiorari. Filed in the Supreme Court on 12/27/94. Supreme Court case number: 94-1140. (lina) [93-1927]
1/13/95	Opinion can be found in Federal Reporter 39 F. 3d 5 (bevy) [93-1927]
5/4/95	U.S. SUPREME COURT ORDER granting petition for writ of certiorari limited to the following question: "Whether Rhode Island may, consistent with the First Amendment, prohibit truthful, nonmisleading price advertising regarding alcoholic beverages?" filed in the Supreme Court on 05/01/95. (lina) [93-1927]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

Civil Action No. 92-0115
JURY TRIAL DEMANDED

44 LIQUORMART, INC. and
PEOPLES SUPER LIQUOR STORES, INC.,
Plaintiffs,

v.

KATE F. RACINE, In Her Capacity As Rhode Island
Liquor Control Administrator,
Defendant.

COMPLAINT

Parties

1. Plaintiff, 44 Liquormart, Inc. (hereinafter "44 Liquormart"), is a Rhode Island corporation with a principal place of business at 39 Putnam Pike, Johnston, RI. Plaintiff, 44 Liquormart, is engaged in the lawful sale of alcoholic beverages at retail for consumption off the licensed premises.

2. Plaintiff, Peoples Super Liquor Stores, Inc. (hereinafter "Peoples Super Liquor"), is a Massachusetts corporation with principal places of business in Massachusetts at 446 Dartmouth Street, New Bedford, MA; 139 Hathaway Road, New Bedford, MA; and 153 Huttleston Avenue, Fairhaven, MA. Plaintiff, Peoples Super Liquor, is engaged in the lawful sale of alcoholic beverages at retail for consumption off the licensed premises.

3. Defendant, Kate F. Racine (hereinafter "Racine"), is the Liquor Control Administrator for the State of

Rhode Island, with an official address at 235 Richmond Street, Providence, RI.

Jurisdiction

4. This Court has federal subject matter jurisdiction over this matter pursuant to 28 U.S.C. § 1331, because the issues presented pose (a) a federal question concerning the constitutionality of two Rhode island statutes, General Laws 1956 (1976 Reenactment) §§ 3-8-7 and 3-8-8.1 (hereinafter "R.I.G.L. § 3-8-7 and R.I.G.L. §3-8-8.1"), and Rhode Island Liquor Control Administration Rule and Regulation 32, (hereinafter "Regulation 32") under the First and Fourteenth Amendments and the commerce clause; (b) a federal question concerning the validity of R.I.G.L. §§ 3-8-7 and 3-8-8.1 and Regulation 32 under the Sherman Anti-Trust Act, 15 U.S.C. §§ 1-7; and (c) a federal question concerning the validity of R.I.G.L §§ 3-8-7 and 3-8-8.1 and Regulation 32 under 42 U.S.C. § 1983.

Allegations Common To All Counts

5. James H. Spevock (hereinafter "Spevock"), the President of plaintiff, 44 Liquormart, is the holder of a class-A liquor license in the State of Rhode Island.

6. On several occasions, beginning in the summer of 1991, while Spevock was going through hearings in the town of Johnston, Rhode Island to procure his class-A liquor license, and continuing into early 1992, Spevock had contact with defendant, Racine, and stated to her that he wished to be informed about the statutes, rules and regulations applicable to retail alcoholic beverage retailers in Rhode Island. During these conversations, defendant, Racine, advised Spevock that his newly-procured license would be suspended and possibly revoked, pursuant to R.I.G.L. § 3-8-7 and Regulation 32, if he were to advertise the prices of alcoholic beverages in any publications or through the radio or television media. De-

fendant, Racine, further advised Spevock that no media outlet with a principal place of business in Rhode Island would be allowed, pursuant to R.I.G.L. § 3-8-8.1, to accept, publish or broadcast such retail alcoholic beverage price advertisements. As grounds for the restrictions imposed by R.I.G.L. §§ 3-8-7 and 3-8-8.1 and Regulation 32, defendant, Racine, cited the alleged governmental interests in promoting temperance and the reasonable control of traffic in alcoholic beverages, as stated in R.I.G.L. § 3-1-5.

7. In December of 1991 a hearing was held by defendant Racine, presiding as Liquor Control Administrator, to determine whether plaintiff, 44 Liquormart, had violated R.I.G.L. § 3-8-7 and Regulation 32 by having the word "WOW" published in place of a price in an advertisement plaintiff, 44 Liquormart, had placed in a December 1991 edition of the Providence Journal, a daily newspaper published and circulated in Rhode Island. At the conclusion of the hearing, defendant, Racine, determined that a violation had, indeed, occurred, fined plaintiff, 44 Liquormart, $400.00, and ordered that the advertisement, as printed, cease to run. On December 17, 1991, plaintiff, 44 Liquormart, paid the fine.

8. On several occasions in 1991 and 1992, representatives of Peoples Super Liquor also had contact with defendant, Racine, and advised her of their desire to have plaintiff, Peoples Super Liquor, advertise its alcoholic beverage prices in newspapers and through radio and television outlets with principal places in business in Rhode Island. Defendant, Racine, advised the representatives of plaintiff, Peoples Super Liquor, that this would be impossible, because R.I.G.L. § 3-8-8.1 expressly prohibits the Rhode Island media from advertising retail alcoholic beverage pricing information. Defendant, Racine, again cited the alleged governmental interests in promoting temperance and reasonable control of traffic in alcoholic beverages as grounds for the restrictions imposed by the statutes and regulation.

COUNT ONE

Violation Of First Amendment Rights

9. The allegations contained in paragraphs 1-8 are repeated and incorporated as if fully set forth herein.

10. R.I.G.L. §§ 3-8-7 and 3-8-8.1 and Regulation 32 violate plaintiffs', 44 Liquormart's and Peoples Super Liquor's, right to free speech guaranteed under the First Amendment to the United States Constitution, as applied to the states under the Fourteenth Amendment. By denying plaintiffs, 44 Liquormart and Peoples Super Liquor, the ability to advertise their retail alcoholic beverage prices, R.I.G.L. §§ 3-8-7 and 3-8-8.1 and Regulation 32 have denied plaintiffs, 44 Liquormart and Peoples Super Liquor, the protected right to engage in free speech which would enhance their lawful and legitimate business and commercial interests, and such free speech would not be misleading to the public.

11. R.I.G.L. §§ 3-8-7 and 3-8-8.1 and Regulation 32 do not advance the alleged governmental interest in temperance and reasonable control of traffic in alcoholic beverages asserted by defendant, Racine. In fact, there is no statistical evidence to either show that banning the publication of retail alcoholic beverage prices in any way promotes or results in public temperance, or that the traffic in alcoholic beverages is affected in any way by the publication or broadcast of price information.

12. R.I.G.L. §§ 3-8-7 and 3-8-8.1 and Regulation 32 are more extensive than necessary to advance the alleged governmental interests, enunciated through defendant, Racine, of promotion of temperance and reasonable control of traffic in alcoholic beverages. Even assuming that the enunciated governmental interests are legitimate, less restrictive means can and should be used to achieve the desired results.

13. Plaintiffs, 44 Liquormart and Peoples Super Liquor, have suffered economic harm in the form of lost business opportunity and incurred monetary damages as a result of being denied their right, under the auspices of R.I.G.L. §§ 3-8-7 and 3-8-8.1 and Regulation 32, to engage in protected free speech.

14. WHEREFORE, plaintiffs, 44 Liquormart and Peoples Super Liquor, respectfully request that this Court:

(a) Enter a judgment declaring R.I.G.L. §§ 3-8-7 and 3-8-8.1 and Regulation 32 invalid because they violate the First Amendment to the United States Constitution; and

(b) Provide such other and further relief as this Court deems appropriate.

COUNT TWO

Violation Of Fourteenth Amendment Rights

15. The allegations contained in paragraphs 1-13 are repeated and incorporated as if fully set forth herein.

16. R.I.G.L. §§ 3-8-7 and 3-8-8.1 and Regulation 32, both on their face and as applied, violate the equal protection clause of the Fourteenth Amendment to the United States Constitution because they deny plaintiffs, 44 Liquormart and Peoples Super Liquor, an equal opportunity to advertise retail alcoholic beverage prices within media outlets with principal places of business in the State of Rhode Island. In addition, R.I.G.L. § 3-8-7 denies plaintiff, 44 Liquormart, a Rhode Island alcoholic beverage retailer, an equal opportunity to advertise alcoholic beverage prices in publications or broadcast media based outside the State of Rhode Island. The unequal effect of R.I.G.L. §§ 3-8-7 and 3-8-8.1 and Regulation 32 is further illustrated and underscored by the fact that retailers who are not licensed by the State of Rhode Island may advertise their alcoholic beverage prices in media outlets

which maintain principal places of business outside the State of Rhode Island. These out-of-state advertisements may then be disseminated within the State of Rhode Island, thereby giving unfair advantage to the out-of-state competitors of Rhode Island retail alcoholic beverage sellers. R.I.G.L. §§ 3-8-7 and 3-8-8.1 and Regulation 32 thus (a) make all retailers a class which is discriminated against by virtue of their desire to advertise their lawful alcoholic beverage prices and (b) make the Rhode Island retailers a class which is discriminated against by virtue of the state in which they have chosen to be licensed.

17. There is no rational basis for the wording and application of R.I.G.L. §§ 3-8-7 and 3-8-8.1 and Regulation 32. The goals of these statutes and regulation, articulated by defendant, Racine, as the promotion of temperance and reasonable control of traffic in alcoholic beverages, are not sufficient to justify the denial of equal protection to Rhode Island alcoholic beverage retailers like plaintiffs, 44 Liquormart and Peoples Super Liquor.

18. Plaintiffs, 44 Liquormart and Peoples Super Liquor, have suffered economic harm in the form of lost business opportunity and incurred monetary damages as a result of being denied their right, under the auspices of R.I.G.L. §§ 3-8-7 and 3-8-8.1 and Regulation 32, to equal protection under the laws.

19. WHEREFORE, plaintiffs, 44 Liquormart and Peoples Super Liquor, respectfully requests that this Court:

(a) Enter a judgment declaring that R,I.G.L. §§ 3-8-7 and 3-8-8.1 and Regulation 32 invalid because they violate the Fourteenth Amendment to the United States Constitution; and

(b) Provide such other and further relief as this Court deems appropriate.

COUNT THREE

Violation of the Commerce Clause

20. The allegation contained in paragraphs 1-13 and 15-18 are repeated and incorporated as if fully set forth herein.

21. R.I.G.L. §§ 3-8-7 and 3-8-8.1 and Regulation 32 violate Article 1, § 8 of the United States Constitution, the commerce clause, because they stifle competition between alcoholic beverage retailers inside and outside of Rhode Island. Under the prevailing Rhode Island statutory scheme, retailers licensed in Rhode Island are prevented from fully engaging in interstate commerce with each other and with retailers in other states.

22. Plaintiffs, 44 Liquormart and Peoples Super Liquor, have suffered economic harm in the form of lost business opportuinty and incurred monetary damage as a result of being denied their right, under the auspicies of R.I.G.L. §§ 3-8-7 and 3.8.8.1 and Regulation 32, to engage in interstate commerce.

23. WHEREFORE, plaintiffs, 44 Liquormart and Peoples Super Liquor, respectfully request that this Court:

(a) Enter a judgment declaring that R.I.G.L. §§ 3-8-7 and 3-8-8.1 and Regulation 32 are invalid because they violate Article 1 § 8 of the United States Constitution, the commerce clause; and

(b) Provide such other and further relief as this Court deems appropriate.

COUNT FOUR

Violation of The Sherman Anti-Trust Act

24. The allegations contained in paragraphs 1-13, 15-18 and 20-22 are repeated and incorporated as if fully set forth herein.

25. R.I.G.L. §§ 3-8-7 and 3-8-8.1 and Regulation 32 violate the Sherman Anti-Trust Act, 15 U.S.C. §§ 1-7, because they stifle competition between retailers inside and outside of Rhode Island. Under the prevailing Rhode Island statutory scheme, retailers, like the plaintiffs, 44 Liquormart and Peoples Super Liquors, are prevented from engaging in legitimate, meaningful or concrete price competition with both other Rhode Island retailers, and with retailers from other states. Enactment of statutes and regulations like R.I.G.L. §§ 3-8-7 and 3-8-8.1 and Regulation 32 does not, in and of itself, constitute implementation of a regulatory scheme sufficient to remove these statutes and regulations from the proscriptions of the Sherman Anti-Trust Act. Furthermore, the state of Rhode Island has not actively or sufficiently supervised this alleged regulatory scheme, as retailers from neighboring states may freely advertise their pricing information in publications and broadcast facilities just outside of Rhode Island's borders and then disseminate such information inside Rhode Island. The net result is to allow unfair advantage and competition among non-Rhode Island retailers inside Rhode Island, which behavior violates the Sherman Anti-Trust Act.

26. Plaintiffs, 44 Liquormart and Peoples Super Liquors, have suffered economic harm in the form of lost business opportunity and incurred monetary damages as a result of being denied the protections of the Sherman Anti-Trust Act with respect to R.I.G.L. §§ 3-8-7 and 3-8-8.1 and Regulation 32.

27. WHEREFORE, plaintiffs, 44 Liquormart and Peoples Super Liquor, respectfully requests that this Court:

> (a) Enter a judgment declaring that R.I.G.L. §§ 3-8-7 and 3-8-8.1 and Regulation 32 are invalid because they violate 15 U.S.C. §§ 1-7, the Sherman Anti-Trust Act; and

(b) Provide such other and further relief as this Court deems appropriate.

COUNT FIVE

Violation Of 42 U.S.C. § 1983

28. The allegations contained in paragraphs 1-13, 15-18, 20-22 and 24-26 are repeated and incorporated as if fully set forth herein.

29. Defendant, Racine's, enforcement of R.I.G.L. §§ 3-8-7 and 3-8-8.1 and Regulation 32 against plaintiffs, 44 Liquormart and Peoples Super Liquor, violates 42 U.S.C. § 1983, because such enforcement deprives plaintiffs, 44 Liquormart and Peoples Super Liquor, of their rights under Article 1 § 8, the commerce clause, and the First and Fourteenth Amendments to the United States Constitution, and further denies plaintiffs, 44 Liquormart and Peoples Super Liquor, of the protections afforded them under the Sherman Anti-Trust Act, 15 U.S.C. §§ 1-7.

30. Plaintiffs, 44 Liquormart and Peoples Super Liquor, have suffered economic harm in the form of lost business opportunity and incurred monetary damages as result of defendant, Racine's, enforcement of R.I.G.L. §§ 3-8-7 and 3-8-8.1 and Regulation 32 against them in contravention of their rights under the United States Constitution and the Sherman Anti-Trust Act, 15 U.S.C. §§ 1-7.

31. WHEREFORE, plaintiffs, 44 Liquormart and Peoples Super Liquor, respectfully request that this Court:

(a) Enter a judgment declaring that R.I.G.L. §§ 3-8-7 and 3-8-8.1 and Regulation 32 are invalid because they violate 42 U.S.C. § 1983; and

(b) Provide such other and further relief as this Court deems appropriate.

PLAINTIFFS DEMAND A TRIAL BY JURY ON ALL ISSUES SO TRIABLE.

44 LIQUORMART, INC. and
PEOPLES SUPER LIQUOR STORES, INC.,

Plaintiffs,

By Their Attorneys,

/s/ Barry J. Kusinitz
BARRY J. KUSINITZ
CORRENTE, BRILL & KUSINITZ
20 Westminister Street
Providence, RI 02903
(401) 751-7777
RI Bar No. 1404

And

/s/ Betsy G. Roberti
EVAN T. LAWSON
BETSY G. ROBERTI
LAWSON & WEITZEN
425 Summer Street
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

C.A. No. 92-0115/P

44 LIQUOR MART, INC. and
PEOPLE'S SUPER LIQUOR STORES, INC.

v.

KATE F. RACINE, in her capacity as Rhode Island
Liquor Control Administrator

ANSWER

1. Defendant is without sufficient knowledge or belief to respond to the averments contained in paragraph 1 of plantiffs' complaint and would therefore leave plaintiffs to their proof.

2. Defendant is without sufficient knowledge or belief to respond to the averments contained in paragraph 2 of plaintiffs' complaint and would therefore leave plaintiffs to their proof.

3. The allegations contained in paragraph 3 of plaintiffs' complaint are admitted, with the correction of defendant's address, which is 233 Richmond Street.

4. Paragraph 4 of plaintiffs' complaint contains legal conclusions to which no response is required. If an answer to these allegations is deemed necessary, they are denied, and defendant would leave plaintiffs to their proof.

5. The allegations contained in paragraph 5 of plaintiffs' complaint are admitted.

6. Defendant admits to communications with James H. Spevock after August, 1991. Defendant would require plaintiffs to prove the remaining allegations of paragraph 6 of their Complaint.

7. The allegations contained in paragraph 7 of plaintiffs' complaint are admitted.

8. The allegations contained in paragraph 8 of plaintiffs' complaint are denied.

COUNT ONE

9. Defendant's responses to the allegations contained in paragraphs 1 through 8 above are realleged and incorporated as if fully set forth herein.

10. The allegations contained in paragraph 10 of plaintiffs' complaint are denied.

11. The allegations contained in paragraph 11 of plaintiffs' complaint are denied.

12. The allegations contained in paragraph 12 of plaintiffs' complaint are denied.

13. The allegations contained in paragraph 13 of plaintiffs' complaint are denied.

14. Defendant denies that plaintiffs are entitled to any relief whatsoever from this Court.

WHEREFORE, Defendant respectfully requests that this Court dismiss plaintiffs' complaint and award it fees and costs herein.

COUNT TWO

15. Defendant's responses to the allegations contained in paragraphs 1 through 14 above are realleged and incorporated as if fully set forth herein.

16. The allegations contained in paragraph 16 of plaintiffs' complaint are denied.

17. The allegations contained in paragraph 17 of plaintiffs' complaint are denied.

18. The allegations contained in paragraph 18 of plaintiffs' complaint are denied.

19. Defendant denies that plaintiffs are entitled to any relief whatsoever from this Court.

WHEREFORE, Defendant respectfully requests that this Court dismiss plaintiffs' complaint and award it fees and costs herein.

COUNT THREE

20. Defendant's responses to the allegations contained in paragraphs 1 through 19 above are realleged and incorporated as if fully set forth herein.

21. The allegations contained in paragraph 21 of plaintiffs' complaint are denied.

22. The allegations contained in paragraph 22 of plaintiffs' complaint are denied.

23. Defendant denies that plaintiffs are entitled to any relief whatsoever from this Court.

WHEREFORE, Defendant respectfully requests that this Court dismiss plaintiffs' complaint and award it fees and costs herein.

COUNT FOUR

24. Defendant's responses to the allegations contained in paragraphs 1 through 23 above are realleged and incorporated as if fully set forth herein.

25. The allegations contained in paragraph 25 of plaintiffs' complaint are denied.

26. The allegations contained in paragraph 26 of plaintiffs' complaint are denied.

27. Defendant denies that plaintiffs are entitled to any relief whatsoever from this Court.

WHEREFORE, Defendant respectfully requests that this Court dismiss plaintiffs' complaint and award it fees and costs herein.

COUNT FIVE

28. Defendant's responses to the allegations contained in paragraphs 1 through 27 above are realleged and incorporated as if fully set forth herein.

29. The allegations contained in paragraph 29 of plaintiffs' complaint are denied.

30. The allegations contained in paragraph 30 of plaintiffs' complaint are denied.

31. Defendant denes that plaintiffs are entitled to any relief whatsoever from this Court.

WHEREFORE, Defendant respectfully requests that this Court dismiss plaintiffs' complaint and award it fees and costs herein.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

The complaint fails to state a claim against this defendant upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

Plaintiffs are not entitled to maintain a cause of action against this defendant based upon 42 U.S.C. § 1983 pursuant to the holding in the United States decision of *Will v. Michigan,* —— U.S. ——, 109 S.Ct. 2304 (1989).

THIRD AFFIRMATIVE DEFENSE

Plaintiffs are not entitled to maintain an action against this defendant insofar as the legislation and Regulation at issue enjoy the presumption of validity and, in fact,

were duly enacted and are not violative of any provisions of the Federal or State constitutions.

Respectfully submitted,

STATE OF RHODE ISLAND

By Its Attorney,

JAMES E. O'NEILL
Attorney General

/s/ Rebecca Tedford Partington
REBECCA TEDFORD PARTINGTON
Special Assistant Attorney General
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FAX: (401) 277-1331

[Certificate of Service Omitted in Printing]

INTERVENORS MEMORANDUM OF LAW

The Rhode Island Liquor Store Association (RILSA) is a non-business corporation organized under the laws of the State of Rhode Island whose membership consists of holders of Class A Retail Liquor Licenses issued by the State of Rhode Island. The active membership in the Association consists of approximately one hundred fifty (150) Class A Retailers. The overwhelming majority of its members are small retail store owners which are, in effect, family run businesses.

The primary purpose of RILSA is to disseminate information to its membership concerning good business practices and also to take an active involvement in legislation which may be pending before the General Assembly. RILSA has been involved in the present landmark case controlling the issue of the right of the State of Rhode Island and the Liquor Control Administrator to regulate the advertising of retail liquor sales. *RILSA v. Evening Call Publishing Co.*, 497 A.2d 331 (1985); (see also *S & S Liquor Mart, Inc. v. Pastore*, 497 A.2d 729 (1985)).

The overwhelming majority of the Class A Retailers in the State of Rhode Island operate at a marginal profit. The elimination of the prohibition on advertising of liquor sales would, of necessity, add an additional financial burden to each of the Class A Retailers who would be obliged to participate in the advertising arena and would be at a definite disadvantage when matched up against retailers who hold multiple licenses.

The Plaintiffs in the within matter are integrally related to one another in that the principal of the 44 Liquor Marts is employed by the Haronian family which owns the two licenses in Taunton, Massachusetts, and an additional Class A license located on Mineral Spring Avenue in North Providence, Rhode Island. The position maintained

by the Plaintiffs is diametrically opposed to the positions maintained by the other Class A Retailers within the State of Rhode Island. The concern of RILSA is that the application by the Plaintiff for relief from this Court may be construed as being the prayer of all similarly situated Class A Retailers. The simple fact is that the small, family run, Class A Retailers are adamantly opposed to advertising.

Rule 24 of the Federal Rules of Civil Procedure provides that anyone may be permitted to intervene in an action when an applicant's claim and defense in the main action have a question of law or fact in common. Intervention, generally, is based on the court's discretion. FRCP 24(b). Additionally, an applicant may have an intervention by right when the applicant claims an interest relating to the property or transaction which is the subject of the lawsuit, and the applicant is so situated that the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect that interest unless the applicant's interest is adequately represented by existing parties. FRCP 24(a)

As has been indicated above, the Plaintiff in this matter certainly does not represent the interests of your intervenor. The need to show that the intervenor's interest is not adequately represented by existing parties requires only that there be a minimal showing. *Trbovich v. United Mine Workers of America,* 404 US 528, 92 S.Ct. 630 (1972). The Court should consider any legal effect on the intervenor's interest in determining whether the motion should be granted. *Natural Resources Defense Counsel, Inc. v. United States Nuclear Regulatory Commission,* 578 F.2d 1341 (10th Cir. 1978).

For the above-stated reasons, your intervenor requests that the motion to intervene be allowed.

RHODE ISLAND LIQUOR
STORE ASSOCIATION

By its Attorney,

/s/ Robert M. Brady
ROBERT M. BRADY
(#2070)
One Grove Avenue
East Providence, RI 02914
(401) 434-2800

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

C.A. No. 92-0115/P

44 LIQUOR MART, INC. and PEOPLE'S SUPER LIQUOR STORES, INC.

v.

KATE F. RACINE, in her capacity as Rhode Island Liquor Control Administrator

---

STIPULATION

Now come counsel for all parties, and hereby agree that the following facts may be agreed upon as true and established as such in the trial of this matter:

1. Defendant Kate Racine currently holds the position of Liquor Control Administrator for the State of Rhode Island and has held that position since August of 1991.

2. The plaintiffs are 44 Liquor Mart, Inc., and People's Super Liquor Stores, Inc., businesses engaged in retail sales of alcoholic beverages. 44 Liquor Mart is located in Johnston, Rhode Island. People's Super Liquor Stores, Inc., is located in New Bedford and Fairhaven, Massachusetts.

3. The Rhode Island Liquor Stores Association, a trade group of small retail liquor stores, has intervened as a party defendant seeking to uphold the price advertising ban.

4. On December 17, 1991, Plaintiff 44 Liquor Mart, Inc. was found to be in violation of R.I. Gen. Laws §§ 3-8-7 and 3-8-8.1 and Regulation 32 of the Liquor Control

Administration regarding the advertising of alcohol prices or referring to price in any way with regard to alcohol. 44 Liquor Mart, Inc. was fined for that violation and paid the fine. 44 Liquor Mart, Inc. did not take advantage of the appeal process provided by State statute. The attached newspaper advertisement is submitted by all parties as a full exhibit. The transcript of the hearing before the Liquor Control Administrator is submitted by all parties as a full exhibit.

5. Other liquor licensees, as well as newspapers within the State, have been warned and fined for a violation of this regulation.

6. Plaintiffs believe that they will each realize an economic benefit of more than $100,000 per year if the price advertising ban is lifted.

7. Racine vigorously enforces the price advertising ban.

8. Peoples has made extensive use of price advertising in Massachusetts where it is permitted.

9. Peoples has attempted to place its advertisements, which include price information, in Rhode Island communications media, but has been refused.

10. Rhode Island communications media reach both Rhode Island and Massachusetts citizens.

11. The proposed speech does not concern an illegal activity and presumably would not be false or misleading.

12. The State of Rhode Island has a substantial interest in regulating the sale of alcoholic beverages.

Respectfully submitted,

FOR THE PLAINTIFFS:

/s/ Evan T. Lawson
EVAN T. LAWSON, ESQ.
425 Summer Street
Boston, MA 02210

/s/ Barry J. Kusinitz, Esq.
BARRY J. KUSINITZ, ESQ.
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Providence, RI 02903

FOR THE RHODE ISLAND LIQUOR STORES ASSOCIATION:

/s/ Robert M. Brady
ROBERT M. BRADY, ESQ.
One Grove Avenue
East Providence, RI 02914

/s/ William P. Gasbarro
WILLIAM P. GASBARRO, ESQ.
685 Warren Avenue
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FOR DEFENDANT KATE F. RACINE

/s/ Rebecca Tedford Partington
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72 Pine Street
Providence, RI 02903

Date: 11/16/92

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Thanksgiving Harvest

44 LIQUOR

39 PUTNAM PIKE • In the 44 Plaza • 2?2-7700

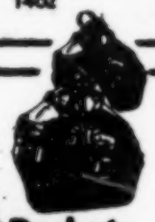
$1.79

State Line Chips
Reg or dip
14oz

2/$1.29

Schweppes Mixers
Ginger Ale, Tonic Water, Club Soda
1 Liter

Peanuts
in shell
Fancy roasted
and salted
89¢ LB.



Gift Baskets
Wine & Liquor
Choose one of or custom
Galore or Personalize one of
your own
at no extra charge.

CIGARETTES
Cartons &
Packs
Sold at state minimum
Reg & King 17.33 ct
100's & 120's 17.65 ct
Packs 1.77

We've got you Number.

THE NUMBERS

Beer

COORS EXTRA GOLD
12 can case

Wines & Coolers

America's Favorite
"Bring Sutter Home"

SUTTER HOME
WHITE ZINFANDEL
750 ML

All your
favorite flavors

SEAGRAM'S
WINE COOLERS
4 PK.

HEINEKEN
12 N.R. Case
America's Favorite

M. G. VALLEJO
WINES
1.5 Liters
Wine for gift giving!

CARLO ROSSI
WINES
4 Liter
Burgundy, Chablis, Rose, Blush,
Pilsano, Rhine, Pink Chablis

BEEFEATER GIN
750 ML
It's Martini time!

ROMANA
SAMBUCA
750 ML

DI SARONNO
AMARETTO
750 ML

WOW!

POPOFF
80°
1.75 Liters
Great with

CAPTAIN MORGAN
SPICED RUM
1 Liter
Rum drinkers' delight

E & J BRANDY
1 Liter
Great taste to you.

SEAGRAM'S 7
750 ML
Gift boxed and ready to go

JACK DANIELS
750 ML
There's only one Jack Black!

J & B SCOTCH
750 ML
Perfect for gift giving.

State Law prohibits advertising Liquor Prices.

OPEN MONDAY-SATURDAY 9-10

PUBLISHER'S NOTE:

The following page is unavailable for filming;

50

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF BUSINESS REGULATION
LIQUOR CONTROL ADMINISTRATION
233 RICHMOND STREET
PROVIDENCE, RI 02903-4200

SHOW CAUSE HEARING

DOUGLAS LIQUORS INC.

44 LIQUOR MART

APPEARANCES:

KATE F. RACINE — LIQUOR CONTROL ADMINISTRATOR

HOWARD R. HARONIAN — COUNSEL FOR DOUGLAS LIQUORS, INC. AND 44 LIQUOR MART

ADMINISTRATOR RACINE: Good morning.

VOICE: Good morning.

ADMINISTRATOR RACINE: It's Tuesday, December 17th. We're here at the Division of Liquor Administration on a show cause hearing regarding Douglas Liquors and 44 Liquors. The reason of the show cause is the disregard for the advertising and general statute of the State of Rhode Island regarding advertising. My name is Kate Racine. I am the Liquor Control Administrator. To my right is Audrey McDermott, who at this moment is acting as a technician but is also Supervisor of Inspections for the Liquor Control Administration. I guess we'll begin with Douglas Liquors. Douglas Liquors have counsel present?

MR. HARONIAN: Yes. My name is Howard R. Haronian. I'm the attorney for Douglas Liquors. My office is at 190 Commerce Drive, Warwick, Rhode Island.

ADMINISTRATOR RACINE: Thank you. 44 Liquors?

MR. HARONIAN: I also represent 44 Liquors. 44 Liquor Mart.

ADMINISTRATOR RACINE: Okay. May I have the name of the owner of Douglas Liquors?

MR. HARONIAN: It's a corporation, Douglas Liquors Inc. The sole stockholder is Kathleen Haronian. Kathleen with a K.

ADMINISTRATOR RACINE: Okay. 44 Liquor Mart?

MR. HARONIAN: It's a wholly owned corporation. The stockholder is Mr. James Spevock. And they are both here.

ADMINISTRATOR RACINE: Thank you. Okay, let's go forward and that is since I came aboard as Liquor Administrator, one of the things that I have had to deal with almost on a daily basis, violations of advertising. Dealing with questions about advertising. First, following

it up, calling people, telling them that the law states to make reference to price in any way is a violation of the statute. Repeatedly, we have had some who have seen fit to go forward and then say, well, I didn't know. We won't run the ad again. That applies to Douglas Liquors and 44 Liquors. At first we felt if we could just deal with the managers or the people placing the advertising, we'd be able to get a handle on it. It hasn't worked. On a daily basis, the phones will ring and there's a complaint. Now, both 44 and Douglas are well aware that there were some tremendous concerns at the time of licensing. Many people said they were a chain, they were going to be able to take over the liquor industry in the state of Rhode Island, and there was a genuine fear that set in among the liquor establishments. The owners knew that. It was quite apparent from the beginning what we were going to be dealing with. I was not here at the time of the licensing. I came shortly after and I met with Bill Kane and I said to him the only thing you've got to do is you've got to obey the law because if you start sending signals out there, first of all 'cause it's the right thing to do, but secondly, you're going to have people and they're going to be running into this office and they're going to look at any way they can to revoke that license. Well, they're here. They're on the door step. Trust me. Okay? And every time the ads come out, they're on the phone. And it's always wonderful at least if you can know what your opposition may be. And in this case, I would call, I would speak, I would say, you know, can you do this? He'd call me. He'd say can I do that? I'd say no. Repeatedly he did what he felt like doing. Now I can't blame him, but I would say, "Bill, are you responsible for the advertising?" And he would say, "Yes." He'd say can I put in that Rhode Island General Law prohibits the price advertising. Sure. I got the ad. It's sent in. He's got "Wow", "Ho", "Yo", and we're back at it again. And it's a slap in the face to me. I don't want to see businesses

in trouble. Now, under the statute and I'll read it into the record again and I have sent numerous copies out of this office—not I but certainly Audrey has—regarding the price or reference to the price of any alcoholic beverages and it refers to newspapers, periodicals, radio, TV broadcaster or any other person, firm or corporation with a principal place of business in the state of Rhode Island, the price—shall not make reference to the price in any way. Any person who violates any of the provisions of this section is guilty of a misdemeanor. All right, fine.

MR. HARONIAN: Could I interject something?

ADMINISTRATOR RACINE: Sure.

MR, HARONIAN: My reading of that statute, which is three eight eight, point one, is that the statute prohibits the person who's in the business of advertising, from advertising anything in reference to price. That would apply to the Providence Journal or whoever. Radio stations or whatever. I think the operative section here would be three eight seven which talks about the licensee.

ADMINISTRATOR RACINE: But I also want to state for the record, Mr. Haronian, that counsel has advised me that any other person, okay, so they're using both.

MR. HARONIAN: Well, I just wanted to tell you the position that we have just so the record will be clear for it. You know, we may—we may just end up disagreeing on that, but as to how we're going to operate, I think we can probably come into agreement on that, but—

ADMINISTRATOR RACINE: I hope so.

MR. HARONIAN: From the point of view of where we are and why I think that probably Bill Kane felt he was justified in doing what he did is that three eight eight one is clearly aimed at the publisher. In fact, the cases cited under it all deal with a case of the association against the Evening Call which it published an ad.

ADMINISTRATOR RACINE: Yuh.

MR. HARONIAN: And we refer to other people in the statute. It says any other person, firm or corporation,

principal place of—which is engaged in the business of advertising or selling advertising time or space. That's an adver—that's an advertiser, an agency, you know. Anyway—

ADMINISTRATOR RACINE: I raised—I raised that as well and they said you could cite that statute as well as three eight seven. We'll put three eight seven, advertising the price of beverages, wine or distilled, if you'd rather be cited under three eight seven, that's fine with me. No manufacturer, wholesaler, or shipper from without the state, no holder of a license issued under the provisions of this title and chaper shall cause or permit the advertising in any manner whatsoever the price of any malt beverage, cordials, wine, or distilled liquor offered for sale in this state provided, however, that the provisions of this section shall not apply to price signs or tags attached to or placed on merchandise for sale within the licensed premises in accordance with rules and regulations of the department.

MR. HARONIAN: (Inaudible murmur.)

ADMINISTRATOR RACINE: Let the record show that Mr. Haronian would prefer the three eight seven, We will take the three eight eight one. We will not use that for citing. We will go under three eight seven.

MR. HARONIAN: And my—my point on three eight seven is that we are not, or that the ads in question did not advertise price. Simply—

ADMINISTRATOR RACINE: Or allude to price.

MR. HARONIAN: Well, see the statute says in any manner whatsoever the price.

ADMINISTRATOR RACINE: That's correct.

MR. HARONIAN: The price.

ADMINISTRATOR RACINE: That's right.

MR. HARONIAN: And we didn't indicate the price.

ADMINISTRATOR RACINE: No. And it—and what we're saying is it has always been the policy of the Liquor Control Administration that to allude to price in any way with the wows all over the place is directly

referring that if I go into Douglas Liquor, Bacardi Breezers and Bailey's Irish Cream are going to be a real sale.

MR. HARONIAN: Uh-huh.

ADMINISTRATOR RACINE: There's something to draw. Division of Liquor Control Administration is one that causes—is—is by statute to bring about temperance. It is not to have wows, leaders, or whatever regarding liquor. This is exactly what the General Assembly did not want.

MR. HARONIAN: I—I—I understand and I, you know, I think what would really help everybody is if, in the regulatory process, the only regulation I would find is number 32, which expanded a little bit on the language of the statute and nobody wants to get into difficulty over this whole issue, and I think the better way to approach it might be to regulate on this subject and point out just what's—what's good and isn't good. This thing says no placard or sign—placard or sign of any kind which is visible from the exterior of any Class A premises licensed to sell at retail shall make reference to the price of any alcoholic beverage or mixture of alcoholic beverages. And then it says you can post prices inside after that. That's really, you know, if somebody reads that and reads three eight seven, they could come to the conclusion as long as they don't put the price in, they could say we have wonderful prices, we have—as long as they don't tell you what the price is. Philosoph—

ADMINISTRATOR RACINE: They—they might be able to draw that conclusion on their own; however, with repeated warnings, which we have here, from the Liquor Control, stating most emphatically and specifically do not continue this operation, it was continued. And regarding the statute and possible change or redefinition, I have made that proposal to people in the liquor industry and all of a sudden they don't want to hear it.

(Inaudible murmur)

No, I'm sorry. I'll speak with you later. But the—but the fact is is that's what we've got and so you've got an industry that it's war with each other, which is not my problem, okay. I'm only hear to enforce the statutes that the General Assembly passes and I have repeatedly stated then go get a lobbyist and go change it. Oh, no, we don't want to do that. We only want to put in what we want and then we want to call you on what somebody else does.

MR. HARONIAN: Yeah.

ADMINISTRATOR RACINE: Okay? So we're leveling this playing field.

MR. HARONIAN: Would—for future—for future reference along those lines, would it be, in your view, proper for a—a license holder to publish ads requesting that people join a movement to do just that. To change the law.

ADMINISTRATOR: I don't think that I would look upon it that—that a liquor ad should be used as a motivator to change the law. I think all of the package store owners have their own association that they're all involved in in a liquor store. Wholesalers, retailers, whatever. That's the arm to use. That's where they should hold a meeting or 44 and Douglas Liquors wants to go to the Assembly, get someone put in a bill, then fine, do it.

MR. HARONIAN: Well, we're thinking of putting an ad in the paper saying—pointing out to people that the statute and the regulations, in our view, are anti-consumer. Now in the view of some other liquor stores owners, those who control the association, they don't want to change that.

ADMINISTRATOR RACINE: That's correct.

MR. HARONIAN: Because they have a great fear that somehow they're going to be hurt if that chang—if the law changes.

ADMINISTRATOR RACINE: Oh, I think they are going to be. I think that's pretty obvious. And that's not up to me to make that decision.

MR. HARONIAN: I don't know because Massachusetts allows—we're one of the last few states that doesn't allow advertising. And liquor store owners seem to do pretty well in Massachusetts and they probably do in Connecticut. I don't know. But I know in Massachusetts they do. So, all I'm trying to —I don't want to get us in trouble again, and if 44 decides tomorrow they want to publish an ad saying look people out there, there's a law on the books which prohibits us from advertising price, so we're not going to do that. What we want to tell you people is you should contact your legislators and you should tell them you don't want that law. You want it changed. And I think we have a First Amendment, probably, right to do that.

ADMINISTRATOR RACINE: Sure.

MR. HARONIAN: We're not going to advertise the pricing, but we would like to be able to tell people why we can't and that they should go out and change it. And maybe we can get the association to join in that. I don't know. I kind of doubt it.

ADMINISTRATOR RACINE: What I—you know —what I've experienced is just the opposite of that. As soon as they know that it's going to go to the Assembly or people should propose it, and certainly you're within your right to do it. I think you're going to cause yourselves more harm than good within the industry and there'll be more questioning about your licenses and I think you can anticipate an appeal about fifteen days after you place the ad, but that is within your purview and we'll hear it at that time. I think there are other ways to do it. And your prices become known very quickly in a community where you render service, sponsor Little Leagues, and do community action, which is where, I believe, the Assembly was coming from when they were so strict with this and I think that they don't—and I don't think a lot of people do think it because of the weight of the—of the liquor lobby and to some extent I agree and then when you really begin to look at it, you've

got this one. It would become incredible. Parking lots would be full of these leader boards and they'd all be giving away something and it would become a nightmare in terms of zoning and keeping properties, you know, somewhat within the confines of the business establishment. So, for all of those reasons, I do find that Douglas Liquors has violated, if you care to, General Laws three eight seven and I'm going to ask Ms. McDermott how many violations we had regarding them. Was it two? And they're two hundred dollars apiece so I'll fine them four hundred dollars to be paid today, check made out to the division of Liquor Control Administration.

MR. HARONIAN: Okay. We would just like for the record to, obviously, enter our objection to that and I would like to preserve for the record any constitutional arguments that we might have with respect to first amendment rights and other constitutional rights, some of which are federal and some of which are state. I know there have been—there's this case—a 1985 case in Rhode Island, the S & S Liquormart case, dealing with the state's—the state's view of what the constitutional provisions require and allow. That, to the best of my knowledge, that never has been tested in Federal Court as to the Federal Constitution.

ADMINISTRATOR RACINE: Are you saying for the record that you don't want to pay this fine?

MR. HARONIAN: I don't know yet. I'm going to consult with the client. But I—I know the fine has been imposed and we'll either pay it or take an appeal.

ADMINISTRATOR RACINE: And where—

MR. HARONIAN: I want—I had to state for the record constitutional arguments.

ADMINISTRATOR RACINE: Okay. And where are you going to take the appeal?

MR. HARONIAN: Pardon me?

ADMINISTRATOR RACINE: Where are you going to take the appeal?

MR. HARONIAN: Well, it would be—

ADMINISTRATOR RACINE: Are you going to take it today for a stay of this decision to Superior Court?

MR. HARONIAN: Well, I, you know, we'd have to follow the Administrative Procedure Act which would be to the Superior Court, yeah. And when we would—what somebody is proposing, other counsel has proposed is perhaps go straight to Federal Court and try to get some ruling under the Federal Constitution. But we'll have to consider all of that.

ADMINISTRATOR RACINE: Okay, so I give you that opportunity. Of course it's within your right. I do believe that certainly I will affix that fine and I will await further notice from you—

MR. HARONIAN: Sure (speaking simultaneously with Administrator).

ADMINISTRATOR RACINE: —by the end of today as to what—in writing as to what the decision is.

MR. HARONIAN: Yes. Okay. We'll either be in—someone will be in here to pay the fine or we'll ask you for a stay while we take the appeal.

ADMINISTRATOR RACINE: Okay. And now let's go to—

MR. HARONIAN: Fourty-four?

ADMINISTRATOR RACINE: —44 Liquors. Again stating for the record that we will cite Chapter three eight seven, advertising price of malt beverages. We are now before—have before us 44 Liquors that no manufacturer or wholesaler or shipper from without the state and no holder of a license issued under the provisions of this title and chapter shall cause or permit the advertising in any manner whatsoever of the price of any malt beverage, cordials, wine or distilled liquor offered for sale in the state provided however the provisions of this section shall not apply to price signs or tags attached to or placed on merchandise for sale within the licensed premises in accordance with rules and regulations of the department. And at this point in time, I have before me 44 Liquors, represented by counsel in the name of Mr. Haronian and

also I believe Mr. Spevock is present. Let the record show that on October 11, 1991, I, Kate F. Racine, Liquor Control Administrator, sent a letter to Mr. Spevock at 44 Liquor Mart Inc., 39 Putnam Avenue, Johnston. Dear Mr. Spevock: The purpose of the notice is to advise you that the Liquor Control Division of the Department of Business Regulation has received a complaint regarding your price advertising. The letter served as a warning. Mr. Spevock was—any further violations of said statute shall result in a show cause hearing. Three months later, here we are, December and we—I believe there was another complaint as well that went out to Mr. Spevock regarding 44 Liquor Mart. Let the record show that we did send a letter to Mr. Spevock, which he claims that he did not get, for a hearing that was called last week. I then sent out Tom Broderick from this division and had the envelopes signed to indicate that in fact those letters have been presented. Mr. Spevock if you'd care to or through counsel, you had—

MR. SPEVOCK: I'd like to just confer with counsel, if I may.

ADMINISTRATOR RACINE: Certainly.

(Pause)

MR. HARONIAN: Probably, to have some time all the way around, we'll incorporate the same responses we had in the other case, which is a very similar case, if you'd care to do that.

ADMINISTRATOR RACINE: No, I want to hear them both separately because—

MR. HARONIAN: Okay, fine.

ADMINISTRATOR RACINE: —and I'll tell you why. I think that to hear them together, even though it may be strange that you both—you have the same counsel, immediately it's going to be flagged.

MR. HARONIAN: True.

ADMINISTRATOR RACINE: It's just going to be one more thing that they will have against you—

MR. HARONIAN: Yeah.

ADMINISTRATOR RACINE: —so I would prefer to handle them separate and apart, very distinctly. Because I think the other way, Mr. Haronian, we're just looking for trouble here, you know.

MR. HARONIAN: Yeah, I think—I think you're right. Mr. Spevock was just explaining to me that he did —he was sort of called down here and given some warnings. He does not recall being warned specifically about the wows in the ad. He recalls being told you have to be careful how you advertise and you're a new licensee so we're going to tell you all these things, but he didn't know that the wow business in the published ads was going to be a particular problem. Anyway, as I—as I previously discussed in a—in a analogous case, we believe that the statute cited is a statute controlling commercial advertisers such as the Providence Journal, in which those ads appeared. And we might inquire as to whether the Journal is going to be brought to task under those provisions of the statute and regulations.

ADMINISTRATOR RACINE: Yes, they are. And that has to be handled for them—it's considered a misdemeanor—through the office of the Attorney General.

MR. HARONIAN: Uh-huh.

ADMINISTRATOR RACINE: And we have been on the phone with him this morning and the December 6th letter to Mr. Spevock that was hand delivered stated three eight seven for the record. He was not cited under the other statute. Okay? And I'll put that in the record. Dear Sir, I am sending this letter to you regarding your continuous disregard for the Rhode Island General Laws regulating the advertising of alcohol or referring to price in way with regard to alcohol. Rhode Island General Laws three eight seven. The division of Liquor Control Administration has been emphatic in stating their demand that you cease and desist your advertising practices and you have ignored repeated requests. Therefore, Thursday, December 12—which was the hearing that they could not

be present for—at nine thirty a show cause hearing will be held at the Liquor Control Administration, two thirty-three Richmond Street. You have the right to be accompanied by counsel at such hearing. Very truly yours, Kate F. Racine. The note that I made—this is the original letter that they had stated they did not receive—consider this the second notice December 17th at nine thirty is the hearing for show cause. And, again, they were sent registered to 44 Liquors and Douglas on twelve twelve ninety-one. And I can understand the concerns and statements of Mr. Spevock because I do remember quite vividly that we were in my office and we talked about advertising and I said, you know, be careful and informed him. However, I personally, along with Audrey McDermott, have had repeated, repeated conversations with Bill Kane. And at that point in time, when I would ask if Mr. Spevock was there, Bill Kane said he would handle it, you know, and so forth. And he apol—and he apologized and said it got in. Then he said no, the Providence Journal is doing it, I'm not doing it. They keep putting that on my ads. Providence Journal said no, we are not putting that on his ads. So it has not been easy for us, either, as you can understand. All we're trying to do is certainly abide by the statute, but to get everyone to understand that the law, as long as that is where it is, that we have to enforce it because there is bedlam in here on a daily basis if we don't. And the phone does not stop ringing and believe me, there are people out there looking at 44 Liquors and Douglas Drug and I think some of them have a full time job doing it. Now, every time the phone rings, do we run out there? Of course not. And that's why repeatedly I would say do us a favor and Bill would think of a new way that he could and there's nothing wrong in ingenuity. God love it. But I said just don't have the ingenuity cause mayhem in this division because once you do it, they're all up and running. They got tote boards. They got kangaroos. They got anything they can think of and it doesn't serve any of us well. And again, if you want

it to be changed, that's entirely your right. You have the right to go up to the Assembly. You have the right to pre-file. This is the period of time. And give it a shot and see what's going to happen. All I'm saying as the Administrator and through my staff is could you just be fair. If it says don't do it, don't do it. (Pause) And are there two violations against 44 as well? So it's a four hundred dollar assessment for 44 as well.

MR. HARONIAN: I'm sorry. I missed that.

ADMINISTRATOR RACINE: It's a four hundred dollar—it's—it's two offenses as reported by my sup—supervisor of inspections and I guess this division will await further notice from you as to the process of appeal, if that's what you are going to consider.

MR. HARONIAN: Yuh.

ADMINISTRATOR RACINE: But again, as we conclude this, and you're—you're within every right to do whatever, as you well know, but understand full well that the laws are there and the laws are there for a reason. We didn't write the laws. We're only here to enforce them.

MR. HARONIAN: Sure. I understand. I just—I did make one comment in the other case and I think it might be something that could be helpful to everyone concerned whether or not this gets appealed or whether or not this group decides to go to Federal Court or whether we go to the General Assembly eventually or what. It—I think it would be a good idea if the regulation was fleshed out a little bit so that it's more specific.

ADMINISTRATOR RACINE: Sir, I have no objection to that. I repeatedly stated to Mr. Spevock early on that I felt that had to be done.

MR. HARONIAN: Yuh.

ADMINISTRATOR RACINE: Okay? But—

MR. HARONIAN: What's the process? (Speaking simultaneously with Administrator)

ADMINISTRATOR RACINE: —I don't do that. You can put a bill in. You can take—

MR. HARONIAN: No, no. Not the law. The regulation.

ADMINISTRATOR RACINE: The regulation? I'm going to hold hearings in February.

MR. HARONIAN: Yeah.

ADMINISTRATOR RACINE: And I intend to look at all of them. And after my experience here, now, for the last four or five months, I think I can better address what we have. I know I'm going to get some flack over it, but I still thing it's worth it. And to be a little bit more aware of what advertising is all about today.

MR. HARONIAN: So we're not—we would not be in a position probably to agree that this—this statute should be enforced, okay, but if it's going to be, it would be so much easier for everyone concerned, for your office, for the dealers, to know if it said, for example, this kind of ad is considered to be price advertising, and with a laundry list of the types of things you're not supposed to do would help in the interim anyway.

ADMINISTRATOR RACINE: Well, I mean, I know that it would help, of course. As soon as you begin to delineate, there's a brain surgeon that's got a better way to delineate and their interpretation is and you're right back where you started because that's America and rah, rah, rah. But I think the office has—has been really fair in calling people and just saying, you know, come on down, rules and regulations, let's talk about it, and we did have a working relationship with Bill Kane and he'd call up—I mean, he was getting a little bit more clever as the hours ticked, but the idea was I said, well, at least call Bill. You know. If we feel or Audrey feels, she's the one that really makes the rulings regarding that. I don't. But I said, you know, don't get yourself in a jam. And again we'd call and oh, the Journal did it and so forth, until finally the people would call and they were being brought in and they'd say but 44's still doing it, Douglas Liquors is still doing it. So I said okay. And now we've got—we're going down to the east bay and the west bay. Believe me, there's more to follow. But

at least make them aware that one isn't going to do it until we change the rule or we promulgate new rules and regulations or we go to the Assembly and amend. And that's fine with me, too.

MR. HARONIAN: Okay.

ADMINISTRATOR RACINE: Okay? You know, I thank you for coming in. I await your decision. I look forward that you will obey the statutes whether you're on appeal or Superior Court or wherever you may go because it just makes everybody's life easier. And it's Christmas. I realize the money situation. I realize one has to compete, but also be aware that that may not be the way to do it. And I'm not so sure what it is at this point in time, but I think if you open Pandora's box, sometimes you create a lot more than you really want to deal with. And as I say—

MR. HARONIAN: It's the law of unintended results.

ADMINISTRATOR RACINE: Well, that's a good way. I've used a few other phrases in the last few months regarding it, but that's very nice. Thanks very much.

MR. HARONIAN: Thank you.

ADMINISTRATOR RACINE: And have a good holiday.

* * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

C.A. No. 92-0115/P

44 LIQUOR MART, INC. and PEOPLE'S SUPER LIQUOR STORES, INC.

vs.

KATE F. RACINE, in her capacity as R.I. Liquor Control Administrator

INTERVENORS: R.I. LIQUOR STORE ASSOCIATION

EXCERPT FROM TRIAL TRANSCRIPT

[112] MS. PARTINGTON: When there is no advertising. If you want to find the best deal, you have to hunt for it. You have to spend sometime and time is money and your time is worth something in finding the best priced commodity. So there are two ways that the price is increased. Also another way that the statute directly advances temperance, and it has nothing to do [113] with price.

The state wants to ensure that the only people that go into a liquor store are people that are so inclined in the first place. People that were going to purchase beforehand and not people that open the newspaper, saw a blow-out sale going on at giant liquor stores and went in and bought several cases and, quite frankly, Judge, the Liquor Control Administrator's emphasis here is not on responsible drinkers. Of course it's not. It's on people that have a very limited income such as young people, people that don't have a lot of people, college students

who would pool their money, go through the newspaper, find out who's having the case sales, the keg sales, drive down to the liquor store and buy as much beer as they can. That's what this particular statute is designed for.

THE COURT: In other words, you're saying that this argument, which has been put forth by counsel, it's sort of—I don't know just how to term it. It's just created without any real substance to it in the sense that it's by preventing price wars that you directly foster temperance?

MS. PARTINGTON: He feels that's an indirect effect; the state feels—

THE COURT: I know but I'm saying that you [114] are arguing that that's just not so. It's not—that indirect argument is just unreal. It's unrealistic; it's not true; it's a figment because you feel that banning price wars is the direct way of fostering temperance.

MS. PARTINGTON: Correct, Judge. I think he terms what's going to happen as an indirect effect; the state terms it as a direct effect. I have, if your Honor would like to consider it, both parties have discussed a case in all the briefs that have been submitted, Adolph Coors v. Brady case. That was in the 10th Circuit. The 10th Circuit sent it back down to Colorado concerning the strength wars. I have a transcript of the judge's bench decision that says preventing strength wars, for instance, 3.2 beer, 3.5 beer is a valid concern to the state and upheld some advertising restrictions. In that jurisdiction you cannot advertise the strength of an alcoholic beverage as an inducement to buy.

THE COURT: All right. Let's go onto something else.

MS. PARTINGTON: Okay.

* * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

C.A. No. 92-0115/P

44 LIQUOR MART, INC. and PEOPLE'S SUPER LIQUOR STORES, INC.

vs.

KATE F. RACINE, in her capacity as R.I. Liquor Control Administrator

INTERVENORS: R.I. LIQUOR STORE ASSOCIATION

DEPOSITION EXCERPTS OF HENRY SAFFER, Ph.D.

* * * *

Q. Now, Doctor, based upon—let me make sure I get everything here—based upon your experience, the materials that you've reviewed, that we just marked, all these documents, on the fact that both plaintiff liquor stores expect to make a profit of upwards of $100,000 per year if this ban is repealed, and based upon generally accepted economic principles, do you have an opinion, to a reasonable degree of scientific and economic certainty, as to whether the Rhode Island ban of price advertising promotes temperance?

A. Yes, I do.

Q. Can you tell me what that opinion is?

A. In my opinion, the ban on price advertising in Rhode Island promotes temperance.

Q. Can you explain to us how?

A. Yes, I can do that. The economists look at the price of alcohol in having two parts; one, is the search

time involved in purchasing the product, in this case, alcohol, and the second part would be the money price, and I think that the price information that's contained in price advertising allows consumers to find lower products, lower product prices, in this case, alcohol, more easily, and so the average price for alcohol would be lower if people could more easily find lower prices. They have the information where they can get alcohol at a cheaper price, then it will be easier for them to find it. The second part of it is the ban on price advertising would not only lowers the money price, but lowers the search time. People don't have to look around as much in order to find lower prices, and then there is really a third part of it, too, the ban of the price advertising results in a greater variance of prices in the state than you'd have without a ban, and that essentially means that people have an incentive to look around more because there's a greater dispersion of prices. Prices can vary more from one place to another than they would in the absence of a price advertising ban, so people would figure that they could perhaps gain something by additional shopping, search time. If there were no ban on price advertising, the variance of prices would probably go down and there would be lesser, lesser search time. All of these factors contribute to linking a price advertising ban to higher prices, and we have pretty good evidence that higher prices results in lower alcohol consumption. That's essentially the link.

Q. Doctor, again, I'm going to ask you a very lengthy question. Based on your experience, on the materials you reviewed, on the fact that both plaintiff liquor stores expect to make a profit upward of $100,000 per year if the ban is repealed, and based upon generally accepted economic principles, do you have an opinion, based upon a reasonable degree of scientific and economic certainty, of the effect of abolishing the Rhode Island ban on advertising of alcoholic beverages?

A. Yes, I do.

Q. Can you tell us what that opinion is?

A. I think if the ban were abolished that it would lower average prices and increase consumption.

Q. And could you, again, tell us, explain to us why?

A. It's the same sort of argument. Same argument that if the ban on price advertising were removed than the average price would go down, and the reason the average price goes down is people can more easily find lower prices.

Q. Is there any one of these documents that you relied upon that explains the theory about search cost?

A. The article by Stigler and Becker, it goes into some detail about it, and also the article by Ornstein and Hanssens specifically relates this theory to the case of price advertising ban.

Q. Okay; since you've mentioned the Ornstein and Hanssens report, Doctor, can you briefly tell us how that article relates to the issue we're discussing here today?

A. The Ornstein and Hanssens study, they include a variable measuring price advertising, and they find that places that allow price advertising have a higher consumption, and they explain the reasoning is basically the search process, and they also explain that—they also report that places that have bans in price advertising have higher mean prices for alcohol and a greater variance in prices. So they both provide a theortical reason and they provide empirical information showing that a ban in price advertising, when price advertising is banned. it reduces consumption.

* * * *

Q. Now, Dr. Saffer, you personally have done research in this area, it did not involve price advertising bans, is that correct?

A. That's correct.

Q. But it did involve general advertising bans, your international study, can you tell us about that, please?

A. Yes, I did a study of 17 countries over 14 years and found—well, these countries have different advertis-

ing ban policies. Some places ban all alcohol advertising, and some places ban just beer and wine advertising. I found looking at these different countries, that places that had bans on alcohol advertising had lower alcohol consumption, lower liver cirrhosis, mortality rates, and lower highway fatalities rates.

Q. How many countries were involved in this study?

A. Seventeen countries.

Q. Over what period of time?

A. 1970 to 1983.

Q. And they involved an entire country, not just a section of a country, is that correct?

A. That's correct.

Q. And why is that important?

A. I think that—what a spill over can have, one, you could have people get publications or media from other parts of the country, so it's probably more important to have an entire country to look at an entire country rather than a small jurisdiction.

Q. Your study focused on advertising bans, is that correct?

A. That's correct.

Q. Can you explain to us the differences between a study regarding expenditures on advertising and advertising bans?

A. When you look at the effect of an advertising ban, looking at really a much bigger variation in the exposure to alcohol advertising. It may be looking at smaller changes in alcohol advertising, it's hard to detect any kind of effect of the small changes, but looking at a ban and analyzing the effect of a ban, you're really looking at, for many people of the country, a lifetime of exposure to alcohol advertising, and I think that greater variation in the level of exposure results—is more likely to result in a finding in the effect of alcohol advertising. I thought it was important in doing the study to look at bans rather than variations in advertising expenditures.

Q. Because in a ban, you're basically starting at ground zero and measuring changes from there?

A. In a ban we're looking at the difference between no advertising and some level of advertising, which is a much bigger difference, in the level of advertising, the variation of advertising than it is in the studies that simply look at variations and expenditures. It's also, it's probably also important in a ban study that the ban have been in effect for a long period of time. Just turning it off doesn't negate the exposure that people have had for many, many years, so like until another generation goes by. The stock of exposure is still there. So it's important also not only to look at a ban, but to also look at the effects of ban over a very long period of time. The best way to do that then is to compare countries.

Q. Just one final lengthy question, Doctor; so to a reasonable degree of scientific certainty based upon your experience, the literature that you read, the fact that each of the plaintiffs in this case expect to gain at least $100,000 per year, and based upon general accepted economic principles, do you have an opinion as to what will happen to consumption of alcoholic beverages in the State of Rhode Island, if the price advertising ban is lifted?

A. Yes, I do.

Q. What is that opinion?

A. I believe if they lifted the price of advertising ban, that it would lower prices and increase alcohol consumption in Rhode Island.

MS. PARTINGTON: Thank you, Doctor; that's all I've got.

* * * *

MR. BRADY: That's how the statute reads.

THE WITNESS: Total sales?

MR. LAWSON: I object to that on the grounds that the state has not heretofore attempted to justify this ban in terms of trafficking, but has justified it in terms of

promoting temperance and in both of your pretrial memos that was the focus of the justification.

MR. BRADY: You can answer the question, if you can, Doctor?

A. Right. I think that, again, the ban on price advertising would result in lower average prices and a higher level of sales in the state, more alcohol consumption, and a higher level of sales, if that is what's meant by trafficking, yes.

Q. Unfortunately we have no legislative official to tell us what the legislative meant. In any event, over how long a period of time did the study, that international study span, the one that you conducted?

A. A 14-year time period.

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Defendant

INTERVENORS: RILSA

DEPOSITION EXCERPTS OF
DR. REGINALD GEORGE SMART

* * * *

MS. PARTINGTON: Okay, I am focusing very specifically on this one article now for the next—for the time being.

THE WITNESS: Okay.

Q. On Page 1 of this article that we are discussing, you acknowledge that some citizens groups, politicians, some professionals and research experts sometimes assert that alcohol advertising leads to increased overall consumption, is that correct?

A. Um, probably. Can you locate me where that is exactly?

MS. PARTINGTON: It's the second sentence.

A. Oh, second sentence. Yes, certainly.

Q. So, there are some research experts who believe that alcohol advertising leads to increased overall consumption?

A. Yes, I think that's true.

Q. And is that a fair statement today? I know this is an '88 study.

A. I think it's a fair statement, today, yes.

Q. All right. Now, you go on, however, just beneath that to state that advertising and alcohol beverage industry statements claim that there is no evidence for the assertion and that their position is that advertising affects only brand shares of the market, is that correct?

A. Yes, that's correct.

Q. So, you set out there are two camps on this issue basically?

A. Yes.

Q. Okay. And on one side we have consumer's groups, government, some research experts who say there's no affect?

A. Well, I think you have some governments thinking that there is no affect and some that probably think there is an affect.

Q. And on the other side you have the advertisers and the alcohol industry saying there's no affect on total overall consumption?

A. Yes, that would be true, but I think that if you look at—if you look at, you know, people in government, there's a big variation like that.

* * * * *

Q. Okay. You disagree with that position?

A. I do disagree with it, and I think that in doing the review of the literature they have only paid attention to one of the papers that's relevant, and it's not the most —it's not the strongest or most convincing paper. It's a paper by Atkin and Block.

Q. Okay. So, you disagree with the AMA, but you realize that that position is out there?

A. Yes, I do.

Q. And that the physicians who are members of the American Medical Association have a different position than you do?

A. Perhaps that's true.

Q. Okay, and that—well, the Board of Trustees report, the Board of Trustees certainly have a different position than you do?

A. I know they would, but I am not sure what the individual physician might think.

Q. Okay. So, you're saying that the Board of Trustees of the AMA is incorrect in their position as far as advertising of alcoholic beverages?

A. Based on this review of the literature that they have, I would say that they have not done a very good job.

Q. Okay. And these are, the membership of the AMA or the members of the Board of Trustees, you don't know who that is or who that was when this was formed?

A. I don't know.

Q. Okay. However, you found that their position was significant enough to note it in your article?

A. Yes. I was trying to give all points of view.

Q. Correct, and you found it significant and noteworthy, so, therefore, you put it in your article?

A. That's right, yes.

Q. Okay. And, also, just one more point that the AMA made, I think, Doctor, I am going to ask you: Do you acknowledge that they take the position that alcohol advertising does to a limited degree appear to influence excessive hazardous and problem drinking?

A. That's certainly what their position says.

A. And you just disagree with that?

A. I think that they have not provided sufficient evidence that that's the case, and they have not really reviewed the literature.

Q. And that the Board of Trustees' position differs from yours?

A. It does.

Q. Okay. And, also, I'm still on the first page of your article, Doctor, you acknowledge and you cite J.K. Galbraith, is that J.K., is that John Kenneth Galbraith?

A. Yes, that's the famous Galbraith.

Q. Okay. And it's his position, and going back to 1958, that advertising affects both brand preference and the aggregate level of consumption, is that correct?

A. Yes, that's true.

Q. And you found that conclusion significant enough to warrant a note in your article?

A. That's right.

Q. On Page 1 of your article, as a matter of fact?

A. That's true.

Q. And you just simply disagree with that finding?

A. Yes, I do—

MS. PARTINGTON: Okay.

A. . . . with regard to alcoholic beverages.

MS. PARTINGTON. Okay.

A. I think Galbraith was talking in general and not focusing on alcoholic beverages.

Q. Okay, but you didn't mention that in your article?

A. Perhaps not.

Q. Okay. Now, Doctor, I've made it to the second page of your article at this point, where you note that a lot of the marketing of alcoholic beverages is aimed at specific segments of the market, such as youth, women and blacks, is that correct?

A. I think that's true, yes.

Q. Is that still true today?

A. I believe it is.

Q. Okay. And that leaders in the alcohol industry have stated that, and you quote, "Without growth we cannot survive," (closed quote), is that correct?

A. That's true.

Q. And do you feel that that's a fair statement today?

A. Probably it would be, yes.

Q. Okay. And then immediately after that, you, and I believe this is attributable to you, the following state-

ment, it's not in quotes, "That although beverage manufacturers claim that they wish only to increase their share of the market, total profits will increase if the market expands and the shares remain the same"?

A. That's correct.

Q. Is that an accurate statement?

A. Yes, it is.

Q. And is that still accurate today?

A. I think it is, yes.

Q. Okay. And, also, in that article, just continuing, you indicate that price is a potent influence on the level of alcohol consumption?

A. I think real price.

Q. Okay. Can you explain it to us what you mean by that?

A. Well, by real price we usually mean price which takes into account disposable income.

Q. Okay. Are you factoring into your definition of real price the search costs for the consumer to obtain a good?

A. No. I think disposable income usually means your income after you have paid for food and lodging.

Q. Okay. Do you think that—are you aware of the notion that the cost of a good should include the search cost in obtaining that good?

A. Yes, I've certainly heard that.

Q. Okay, do you agree with that notion?

A. Probably, yes.

Q. Okay. Doctor, also in your article you mention, and you mention it more than one place, I believe, that advertising has cumulative effects that are difficult to detect in studies of that nature?

A. Yes.

Q. Okay. And that's because the influence of one advertisement is likely to be insignificant, but that the impact of thousands, hundreds of thousands of advertise-

ments over the course of years and over the course of someone's life, is difficult to assess, is that correct?

A. I think it's very difficult, yes.

Q. And that's one of the problems with the studies in this subject area, is that correct?

A. I think it's a problem, but I don't think it's an insurmountable problem.

Q. Okay. And, basically, to sum up what I just said, because advertising effects might not be apparent for probably years?

A. For an individual?

MS. PARTINGTON: Correct.

A. Yes, we don't have any research showing what is the affect of advertising on people over a whole lifetime, but we have lots of research that shows us what's the affect of advertising over a whole population at a point in time.

Q. Correct. Can you turn to Page 211 of that study.

(WITNESS COMPLIED)

A. Yes.

Q. Okay. Now, there is on paragraph that begins at the bottom of the first column and continues into the top of the second that talks about the affect of price on alcoholic beverages. Doctor, I think can we establish you agree that price has an affect on consumption, price of alcoholic beverages has an affect on consumption?

A. I would say so, particularly if you relate price to disposable income.

Q. Okay. And the last—the last sentence in that paragraph that I had just cited to you by Ornstein and Hanssens does indicate a finding that the way the advertising ban works is that "A ban on price advertising raises the mean and variance of price by increasing search costs, and this results in lower consumption"?

A. I think that's a speculation on their part because they don't have any data on search costs, but I think it's a reasonable expectation.

* * * *

Q. So, we're up to 11 different conclusions concerning the affect of advertising on consumption at this point, is that correct?

A. Yes.

Q. And all of these you fund significant enough to put in your article?

A. Oh, yes, um-hum.

Q. And the Ornstein and Hanssens study, yet another conclusion, we're up to 12 at this point.

A. Okay.

Q. Okay. Now, again, reading some of the documents you brought here with you today, there was an article about banning happy hours where you note a negative relationship between alcohol consumption and price, is that a fair statement?

A. A negative relationship. Could you show me that article?

(DOCUMENT SHOWN TO WITNESS)

A. Oh, yes, okay.

Q. Can you explain to me, Doctor, what a negative relationship is?

A. Well, it would mean that as real prices go up, alcohol consumption comes down.

Q. And, inversely, as prices go down, consumption increases?

A. It should, yes.

Q. Okay. And this—many of the studies that you discuss in your various writings factor in adjacent state price, what the price is in a nearby state—

A. Yes.

Q. . . . for alcoholic beverages. And this is because a consumer will travel if they think they will save some money to purchase alcohol, is that correct?

A. Yes, that's true.

Q. And this would strengthen what we've talked about, that price does have a direct influence on consumption, is that correct?

A. Yes, um-hum.

Q. And of the advertising studies that you review, for the most, part involve lifestyle advertising of alcoholic beverages, is that correct?

A. I think there's a mixture. I think there are lifestyle ads and there are what are called tombstone or product ads.

* * * *

UNITED STATES DISTRICT COURT
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vs.

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Defendant

INTERVENORS: RILSA

DEPOSITION EXCERPTS OF DAVID J. PITTMAN, Ph.D.

* * * *

Q. All right. Are you aware of empirical evidence that would refute the conclusion that banning alcohol price advertising promotes temperance?

A. Would you repeat the question, please.

(PENDING QUESTION READ)

A. No, I'm not aware of any.

MR. LAWSON: You may inquire.

MS. PARTINGTON: Just as to the qualifications at this point?

MR. LAWSON: No, as to anything.

MR. BRADY: May we go off the record for one second.

MR. LAWSON: Sure.

MR. BRADY: —relative to what Judge Boudewyns had ruled on earlier.

MR. LAWSON: Sure.

* * * *

Q. When did you prepare this affidavit and report?

A. I prepared it this summer, basically, I forget whether it was July or August, but in that time frame.

Q. But it was prepared following a request from the plaintiffs or their attorneys?

A. That is correct.

Q. Okay, and this was something that you were paid to prepare by the plaintiff?

A. That is correct.

Q. This wasn't something that's been published?

A. No, that is correct.

Q. Do you have any plans to submit it for publication?

A. Perhaps after the case has been resolved I might want to write about the case, but at this particular time I have no plans to publish it.

Q. So it's fair to say it's prepared solely for this litigation?

A. At this time it surely is.

Q. In that report and I'm referring there's an affidavit and then there's a lengthier part at the end that you title a report, I'm talking the second part, the report, you indicate that price advertising leads to lower costs for the consumer for the product being advertised?

A. Uh-huh.

Q. Is that still your position today?

A. Oh, yes. I think that seems to be the whole—what they teach in economics, what we were taught in economics, what most economists believe; that if you have advertising, it leads to lower prices.

Q. Okay, and you agree with that position?

A. Oh, yes, I surely do.

Q. So it's your opinion then that if the Rhode Island alcohol price advertising ban were to be repealed, lower alcohol price would be a direct effect?

A. That should be a direct effect, theoretically speaking.

Q. Okay. Now, Doctor, I think I've read in a couple of studies you performed you take into account, one of

your variables is adjacent state price; am I correct in remembering that?

A. I don't think I've talked about adjacent state price. I've talked about per capita consumption and also price advertising, but not the price in adjacent states. That's not I. It might be somebody else's submitted materials on that.

* * * *

THE EFFECT OF PRICE ADVERTISING ON ALCOHOLIC BEVERAGE SALES

Gary B. Wilcox

During recent years, various consumer groups in many western nations have begun to exhibit a growing concern over alcohol consumption. Generally, the major areas of concern center on alcohol abuse including alcoholism, general heavy drinking, and drunk driving; teenage or youth consumption; and negative health aspects stemming from alcohol consumption (Jacobsen *et al.*, 1983). Resulting from this concern is a consumer movement whose main objective is to reduce both total and per capita alcohol consumption (Marketing News, 1985).

The main target of this movement is alcoholic beverage advertising to which the various collective groups attribute the responsibility for increasing consumption by targeting heavy drinkers, women, light drinkers, and the youth with multimillion dollar advertising and promotion campaigns. These groups such as SMART (Stop Marketing Alcohol on Radio and TV) and CCAA (Citizens Concerned About Alcohol Advertising) have formed to challenge alcohol advertising in the media. State/federal legislatures and the Federal Trade Commission have been involved in discussions about banning alcohol advertising or at least modifying its characteristics.

To complicate the issue, to date there have been only a few reports of empirical studies examining the effects of alcohol advertising and no clear scientific evidence that alcohol advertising increases alcohol consumption. Smart and Cutler (1976) examined the effects of the alcohol advertising ban in British Columbia on beverage consumption. Their analysis revealed that the ban showed no substantial effect on beer, wine, or liquor consumption. Pittman and Lambert (1978) concluded that alcohol beverage advertising did not appear to significantly impact the rate of alcohol abuse and alcoholism in the United States.

Bourgeois and Barnes (1979) examined the impact of per-capita alcohol consumption of banning beer and wine advertisements on Canadian television. They concluded that there was no empirical evidence for attributing increases in alcohol consumption to advertising.

Ogborne and Smart (1980) noted that the relationship between consumption and alcoholism rates for the United States and advertising regulations were very weak and not statistically significant. In the same study they found that there was little evidence that per-capita consumption changed as a result of the restriction of beer advertising in Manitoba, Canada.

To summarize, there appears to be a lack of empirical evidence that alcohol advertising increases alcohol consumption. It is important to note, however, that although a number of studies have examined the impact of general liquor brand advertising upon consumption, there has been no study to date examining the impact of alcoholic beverage *price* advertising upon liquor consumption/sales, particularly where general advertising of brands is allowed. The purpose of this paper is to examine such an issue—the effect of price advertising on sales of beer in a market in which general brand advertising is allowed.

Regulation of Alcoholic Beverages

Historically, the general population has viewed the moderate and temperate use of alcohol beverages "as a lawful growth which God alloweth to all men" (see Howie, 1933). Overindulgence, however, has been recognized from ancient times not only as an evil in itself, but also the cause of crime, cruelty, neglect, and poverty, and therefore, "a fit subject of moral and legal condemnation" (see *Gardner*).

Sale and distribution of alcoholic beverages is recognized as a privilege, not a right, and therefore, subject to governmental control. Such control includes the authority to prescribe reasonable rules, regulations, and conditions

upon which business may be conducted. Although consumption and sales of alcoholic beverages where permitted is as lawful as any other property or business and is fully entitled to protection, the sale of alcoholic beverages is seen to be "dangerous to public health, safety, and moral" and its regulation is fully justified under police power. This power is an incident of society's right to self-protection and it rests upon the right of the state to care for the health, morals, and welfare of the people (*see Pabst, Mugler, Beauvoir, South Carolina, Wilkinson, Gibbons, State, Eberle, Cosmopolitan Club*).

The power of the state to regulate or prohibit the intrastate manufacture, possession, sale, transportation, or use of alcoholic beverages is a matter of universal recognition. This power with respect to alcoholic beverages is allowed to exist as a correlative of the state's duty to support "paupers, to protect the community from crime, and to confine and maintain the criminal since alcoholic consumption is frequently a source of pauperism and crime" (see *Wilkinson, Ziffrin, Samuels*).

A state, in the application of its power to protect its people against the evils related to sale and consumption of alcoholic beverages may exercise large discretion as to the means employed (see *Ziffrin*). The form or method of regulation and control is one of the public policy decisions of each state. The state has far broader power and greater latitude for regulation, restriction of use, and distribution or consumption of alcohol than ordinary because of the effect of consumption on health and welfare of the public (see *Dupont, Miller*). The scope and extent of such regulations depends solely upon the judgment of the lawmakers, provided that they do not exceed the limits of state authority by invading rights which are secured by the Constitution of the United States, and provided further that the regulations adopted do not create discrimination against the rights of residents or citizens of other states (see *Vance*).

From this discussion, it is clear that the states have considerable authority concerning the regulation of alcoholic beverages. However, what is at issue concerning the prohibition of truthful price advertising for alcoholic beverages would be the element of Constitutional abridgement of the citizens' First Amendment rights (see Wilcox, 1982).

Since 1942 governmental regulation of commercial advertising has become a focus of controversy to established First Amendment doctrine. An increasing number of suits have raised constitutional issues regarding regulation of offensive advertising, false or deceptive advertising, and prohibitions of price advertising for various products or services. Until recently, the majority of courts upheld such regulations under the Supreme Court's ruling in *Valentine v Chrestensen* that "purely commercial advertising" is unprotected by the First Amendment.

In *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council, Inc.*, the Court reconsidered the issue, declaring unconstitutional a statute that penalized druggists for advertising prescription drug prices. The Court held that commercial speech is not "wholly outside the protection of the First Amendment," and that it does not lack "all protection."

Recently, several states' prohibition of alcoholic-beverage price advertising have been challenged on grounds that they violate rights guaranteed by the First Amendment. To date, three state courts have held that restrictions on price advertising violate the First Amendment (*Brooks v State Alcoholic Beverage Control Commission, Heir v. Degnam, Wise v Tennessee Alcoholic Beverage Commission*). Currently the issue is under appeal by the Attorney General of Michigan.

The Attorney General of Michigan recently challenged the Michigan Liquor Control Commission's authority to prohibit truthful price advertising for beer. At the center of the controversy were certain administrative rules prom-

ulgated by the Commission, all of which imposed restrictions on the advertising of beer and wine by licensees of the Commission. The principal rule in question, while expressly authorizing more forms of general brand advertising of beer and wine, prohibited retailers from advertising the price of these products. Although these administrative rules, in their present form, were adopted in 1975, substantially similar restrictions have been embodied in the Commission's rule since approximately 1935.

In June of 1979, the Commission received a letter from the Governor of Michigan recommending that the Commission amend its rules so as to remove the prohibition against off-premise price advertising restrictions. In August 1979, in accordance with the Governor's request, the Commission filed proposed amendments which would have substantially reduced the restrictions on such advertising and which would have expressly authorized price advertising by businesses licensed to sell beer for off-premise consumption. These proposed amendments were approved as to legality by the Attorney General, but in December 1979 a vote to approve the proposed amendments failed to win passage before the Legislative Joint Committee.

[Tables 1 and 2 Omitted in Printing]

Meanwhile State Representative Richard Fitzpatrick made a written request for an Attorney General opinion addressing the constitutionality of the Commission's rule prohibiting truthful off-premise price advertising. In February 1982, pursuant to the request, the Attorney General issued a document stating that:

> prohibiting the truthful price advertising of alcoholic beverages was unconstitutional in that rule (1) violated the freedom of commercial speech guaranteed by the First and Fourteenth Amendments to the United States Constitution and by Article 1 of the Michigan Constitution of 1963 and (2) constituted an unreasonable exercise of the Commission's police power authority.

Following the issuance of the Attorney General's opinion, the Commission ceased enforcement of the administrative rule in question. However, in June of 1982 action was taken by the Commission seeking a declaration that the Attorney General's opinion was invalid, and a further declaration that the administrative rules of the Commission addressed in those opinions were valid and enforceable. In June 1983 an Ingham County Circuit Court judge ruled that the Attorney General did not have the power to repeal the ban in February 1982, and that the administrative rules prohibiting price advertising should be reimposed. Restrictions were again placed on price advertising in June 1983.

The Present Study

The present study examined total sales for brewed beverages sold for off-premise consumption. This total included the following types of brewed beverages: malt liquor, imported beer, price brands, popular brands, super premium brands, light brands, premium brands, and ale.

The study used information from A. C. Nielsen in-store audits for the geographic region of Lower Michigan. Sixty-five retail outlets were included in the Nielsen sample—40 food stores and 25 party/liquor stores. The sales were reported every two months for a period starting May/June 1981 and ending March/April 1984.

An analysis of variance was used to compare total sales before (period 1), during (period 2), and after (period 3)—the price advertising restrictions. The dependent measure was total sales for brewed beverages. The independent measure was the presence or absence of price advertising as determined by the restrictions noted above.

[Figure 1 Omitted in Printing]

Based on previous empirical work concerning the relationship of advertising and alcohol consumption, the following hypothesis was investigated:

There will be no significant difference between sales of brewed beverages during the price advertising restrictive periods and the price advertising nonstrictive period.

Findings

Before the analysis of sales was undertaken, a manipulation check was performed to determine if there was a significant difference in amount of local advertising between the three periods. An analysis of variance was performed using the percentage of stores engaging in local advertising for brewed beverages as the dependent variable and the presence/absence of price advertising as the independent measure (see Table 1). The analysis of variance revealed that there was a significantly higher percentage of retail stores engaging in local advertising during the nonrestrictive period.

Table 2 contains the analysis of variance results which test the hypothesis (see Figure 1). The sales for brewed beverages provide support for the hypothesis, in that the presence of price advertising appeared to have no significant effect on sales of brewed beverages.

Discussion

The findings of this study suggest that the presence of price advertising had no significant effect on beer consumption. Generally, this finding supports previous research concerning the effect of alcohol advertising on consumption in that there is still no scientific evidence that links alcohol beverage advertising to increased consumption or abuse. However, this was the first attempt to examine the effects of *price advertising* on sales in a market that allows general brand advertising for alcoholic beverages.

Applying the findings to the public policy issues point to an important conclusion. It can be assumed that a state has a valid and important interest in regulating the

advertising of alcoholic beverages. There is no question that a state should be allowed to regulate the time, manner, and place of such advertisements. Even conceding these interests, there seems to be no obvious reason to completely suppress the dissemination of truthful information about price. Indeed, the states generally allow other types of advertising for alcoholic beverages not only in the print media, but in broadcast as well.

For retailers, the emergence of national brands of beer accompanied by national advertising media budgets have built consumer recognition of the advertised brands, enabling the public to readily identify and compare price where ever sold. Because the product is recognizable, its approximate price in the market is widely known. In turn the identifiableness of brands by the consumer tends to create a maximum price on widely recognized brands within a market. An incentive for the retailer to advertise the product at a lower price and create the impression that his store offers bargains may be present. However, in areas that prohibit price advertising, this normal functioning of the market place is restricted. The retailer is restricted from fully employing his retailing strategy. While the regulation of alcoholic beverages is a very complicated issue, the total prohibition of price advertising appears to be an unnecessary restriction in a free enterprise economy.

ALCOHOLIC CONTROL LAWS AND THE CONSUMPTION OF DISTILLED SPIRITS AND BEER

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This article tests the social marketing effectiveness of alcohol control laws designed to reduce the consumption of alcoholic beverages. The study uses state-level historical data to estimate the demand for distilled spirits and beer using economic, sociodemographic, and control-law explanatory variables. Spirits and beer consumption are found to react differently to changes in economic sociodemographic, and regulatory variables. These differences suggest a consumer and product segment-based approach to alcohol control laws or social marketing that emphasizes measures directed at youths for beer and at price for spirits.

Much research attention is given to the impact of economic and informational variables such as price, product quality, and advertising on consumer behavior. Less attention is given to the impact of market regulations, although a host of regulations is often in operation in a given market. Economic, informational, and regulatory factors are of course interrelated since, for example, regulations often change the amount and kinds of information available to consumers (Day and Brandt 1974) or the real price facing consumers. Nevertheless, the impact of regulations on consumer behavior deserves separate study to examine how effective the regulations are—especially as they relate to economic and other factors affecting consumers. What, for example, dominates consumer decisions in a given market: price, advertising, or market regulations? Although much regulatory legis-

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lation is passed, its effectivness in influencing consumer decisions is often open to question.

Another regulatory issue that has not received much attention is the interaction of regulations with consumer and product segments. Social marketers and the architects of market-influencing laws expect segmentation to maximize results—as in traditional demand-increasing efforts—since segmentation can produce larger gains than a uniform treatment of consumers and products can. It is well recognized that social marketing is a far more difficult task than traditional marketing for a variety of reasons, among them a lack of good information on consumers relating to social issues and a general inability to segment the market (Bloom and Novelli 1981). To the extent that consumer and product segments can be more clearly identified, laws and social marketing can be directed to specific market segments, reducing coercive and wasteful effects on all other segments.

This article studies these issues in a product area that has long been heavily regulated: alcoholic beverages. It looks at the fundamental, aggregate determinants of demand for alcoholic beverages in order to assess the role of regulations relative to economic and sociodemographic variables, and to identify consumer and product segments relative to regulation.

Alcoholic beverages are the tranquilizer of choice in this country, providing relaxation and facilitating social interaction for millions. But excessive alcohol consumption produces externalities of unknown size as the result of auto accidents, medical costs, fires, and social services for alcoholics. Attempts to minimize these and other alcohol-induced social costs by means of alcohol control laws have been made in many countries for centuries. While numerous studies have examined individual control laws (frequently finding little relationship between a law and consumption) or such social indicators of drinking as drunk arrests, driving while intoxicated, or alcohol

mortalities (Popham, Schmidt, and de Lint 1976), few studies have examined a variety of control laws as a group. As a result, the overall efficacy of control laws in reducing consumption and their differing effects on each beverage are in doubt. The purpose of this study is to fill this gap by estimating the impact of a variety of control measures on the demand for distilled spirits and beer. Unfortunately, wine had to be deleted because of a lack of price data.

This article is organized around a discussion of the three major groups of factors that determine alcohol consumption: economic, sociodemographic, and regulatory. After a brief history of U.S. alcohol control laws, various hypotheses about the effects of these factors are offered. Next, the results of econometric demand estimation for distilled spirits and beer are discussed, with special attention paid to models for license states. Finally, conclusions are formulated, particularly concerning the relative influence of economic, sociodemographic, and regulatory variables on consumers, and the government's ability to "demarket" alcohol products.

A BRIEF HISTORY OF ALCOHOL CONTROL LAWS

Alcohol control laws can be divided into three general categories: (1) economic legislation directed at raising revenues for the state and/or protecting sellers from competition, (2) attempts to control the social costs resulting from excessive drinking, and (3) attempts to prevent product adulteration and false advertising. Following the end of Prohibition in December 1933, each state (and in many cases, local city and county governments) adopted a wide range of alcohol control laws. Many of these—control of hours and days of sales, limited licenses, one drink sales—had been in existence at various times for centuries. The most prominently mentioned public interest purposes for such laws were the control of crime, the raising of public revenue, and the control of

problems stemming from consumption—particularly excessive consumption. The central focus of consumption control was a systematic attack on the market mechanism through price controls, limits on entry, advertising restrictions, state monopoly controls, elimination of tied houses, and bans on such nonprice competition as consumer credit, games, prizes, giveaways, and free samples. There is little doubt that following Prohibition there was broad public support for protecting the public interest by restricting competition.

Unique post-Repeal control laws restricted price competition by using resale price maintenance in license states and uniform pricing in monopoly states. The laws also restricted alcohol brand-label content and the media's use of advertising, and they eliminated tied "saloon" houses or forward integration into retail sales. They banned advertising in certain media or heavily censored its content under the justification that such restrictions would reduce the demand for alcoholic beverages. Interestingly, there is little evidence to support the view that the absence of advertising during Prohibition lowered consumption (Warburton 1932). Advertising-content regulations were also designed to prevent such false and misleading advertisements as the widespread pre-Prohibition ads proclaiming the miraculous healing powers of alcoholic beverages.[1] Label contents were regulated to control misinformation,

[1] Some of the more egregious examples of health claims appearing in liquor ads before prohibition were: "America's greatest medicine," "Nursing mothers—build up your strength and the health of your infant by taking an invigorating stimulant," "Coughs, colds, grippe, asthma, bronchitis, and consumption speedily cured," "Good for the kidneys—that concentrated essence of the juniper berry known in its purest form as gin," (Russell 1940). Before condemning advertisers for what is now known to be patently false, it should be remembered that the curative powers of alcoholic beverages were widely subscribed to for centuries. In 17th and 18th century England and America many people thought a daily ration of beer or ale was a necessary ingredient for good health and thus for life itself.

but there is some evidence to suggest that label regulations were used by existing distilled spirit manufacturers to control new firm entry (Urban and Mancke 1972).

Targeting saloons and tied houses for elimination was a central focus of temperance groups, since under the system of tied houses, manufacturers and wholesalers were said to put continual pressure on saloon-keepers to increase sales and profits. And striving for greater profits was held to be incompatible with consumption-control policies. The resulting ban on vertical integration was thought to weaken the profit motive (McGuire and Staelin 1983). A similarly specious argument was used to justify the state monopoly system of sales, which was thought to remove the profit motive from the sale of alcoholic beverages, thereby reducing sales.

There was clearly both antagonism and cooperation between temperance groups and various levels of sellers of alcoholic beverages around the time of Repeal. Conflicts existed over such policies as state monopoly selling and vertical integration. However, under the licensing system of sales, unwittingly or by design both temperance groups and retail sellers worked to restrict competition—one group seeking a reduction in drinking externalities and the other group seeking monopoly rents.

The Demand Model

There have been a number of attempts to estimate the demand for individual alcoholic beverages (Ornstein and Levy 1983), ranging from complex treatments like Niskanen's (1962) simultaneous-equation system for beer, wine, and distilled spirits and the systemwide approach of Clements and Johnson (1983) to simple single-equation price-income models, like Hogarty and Elzinga's (1972) study of the demand for beer. Many of these models share an almost complete lack of attention to the highly regulated markets in which alcoholic beverages are sold, and to how various regulations may affect the demand for

alcoholic beverages. (Major exceptions include Morin 1966; Simon 1966; Smith 1976; and Weinstein 1983). The main purpose of our demand estimation is to assess the significance of various control laws as a guide for judging their effectiveness in demarketing alcohol consumption. Since the main control laws are at the state level, this requires a cross-sectional demand model. The model in aggregate form is:

$$C_{it} = k \prod_{j=1}^{n} E_{jit}^{b_j} \prod_{j=n+1}^{m} SD_{jit}^{b_j} \prod_{j=m+1}^{p} R_{jit}^{b_j} e^{u_{it}}$$

where

C_{it} = Consumption per capita in state i in year t

E_{jit} = Economic variables ($j = 1, \ldots, n$)

SD_{jit} = Sociodemographic variables ($j = n + 1, \ldots, m$)

R_{jit} = Regulatory variables ($m + 1, \ldots, p$)

u_{it} = Error term

We postulated a multiplicative model because we expected the economic, sociodemographic, and regulatory variables to have nonlinear, interactive effects on consumption. The log-linear, constant-elasticity formulation makes it possible to distinguish increasing and decreasing scale effects. The variables tested are listed in the Exhibit.[2] Data sources are in the Appendix.

An alternative research test would have involved long time series data, which allow comparison of pre- and post-regulation effects on consumption. This is a superior test because of the potential endogeneity of regulations in each state; for example, if regulations simply reflect prior cultural attitudes towards drinking, then passing new regulations may have little effect on consumption. However, since such data are not available for all regulations for a sufficient time period, we were forced to use the cross-section analysis. The latter is nevertheless quite powerful

[2] A more complete description of the data is available from the authors.

in that it explains differences in equilibrium consumption levels under different regulatory regimes.

No supply equation is specified, since the cost of supply, absent transportation costs, is relatively invariant across states. Distilled spirits are produced in a few states or they are imported; beer is manufactured regionally because of transportation-cost considerations. Roughly three-quarters of all states have "affirmation" laws requiring manufacturers to sell to wholesalers at prices no higher than the lowest price in all other states. Finally, simultaneous-equation estimation of a cross-section model by Smith (1976) did not prove superior to ordinary least squares.

Economic Variables

The dependent variable is annual consumption per capita. For distilled spirits there is some measurement error because all sales in a given year are not necessarily consumed in that year and because some consumption comes from illegal production. But this error is minor and is taken up by the error term. More specifically, inventoried spirits are more than likely to be consumed on a regular basis, creating little distortion in any given year. Illegal production and sale is a minor problem today. For example, in 1956—the peak post-war year for federal seizures of stills—there were over 14,000 stills seized, while in 1977 and 1978 there were 481 and 361, respectively (*The Liquor Handbook*, 1979). Total consumption is deflated by the population 14 years of age and older, rather than by the minimum legal drinking age, to account for underage consumption.[3] If the starting age for

[3] Some would maintain that the dependent variable should measure the amount of consumption by heavy drinkers since heavy drinkers are primarily responsible for the social costs of drinking. Attempting to meet this argument, alcohol-related mortality as a proxy for excessive drinking was also used as a dependent variable, covering deaths from alcohol cirrhosis, alcohol psychosis, and al-

underage drinking differs across states. this can introduce some error; however, the results are insensitive to differing levels of population age deflation.

The economic variables consist of real price, real income per capita, price in adjacent states, and out-of-state travel. A conventional demand variable that is not included is the price of substitutes. Previous demand estimation studies over the past thirty years have found no consistent evidence of substitutability between beer, wine, and distilled spirits (Ornstein and Levy 1983). This lack of evidence does not mean that substitutability does not take place but rather that without large shocks to the market, substitutability is difficult to detect econometrically.

The relationship between consumption and price is subject to bias because state boundaries do not coincide with economic markets in some cases (Wales 1968). Because of price differentials between states, consumers cross state borders to purchase alcoholic beverages. As a consequence, states with relatively high prices have understated per capita consumption while states with relatively low prices have overstated per capita consumption. When this border-crossing effect is in operation, price elasticity is biased upward. To correct this bias, the lowest-price-

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coholism. The results were distinctly inferior to those obtained using mean consumption, with such perverse results as positive price elasticities. A major problem in the use of alcohol-mortality data is measurement error—reported alcohol mortalities grossly understate true alcohol mortalities. For example, in 1977 there were 18,783 alcohol mortalities reported, but HEW personnel estimate the true figure to be in excess of 200,000. The discrepancy arises from a lack of autopsies in some areas, large variance in the quality and incidence of autopsies across states and within states, and the social stigma of listing alcohol as a contributor to death on death certificates. In any event, mean consumption is a fair proxy for heavy drinking. The simple correlation between mortality per capita and consumption per capita in our samples is 0.60 for distilled spirits and 0.28 for beer, both significant at the 0.01 level. Liver cirrhosis mortality data has, however, been used successfully in other studies (Cook and Tauchen 1982).

adjacent-state variable is included. Border crossing is a function of the relative price differential between adjacent states and the cost of transportation (ignoring the cost of being caught). As a crude proxy for transportation costs the size of state is included in adjacent state price. The adjacent state price variable is measured by dividing the lowest adjacent state price by own state price and then dividing this new ratio by state size. To illustrate, holding state size constant, in states with relatively higher prices, adjacent state price is less than one, while in states with relatively low prices, adjacent state price is greater than one. In both cases, as adjacent state price increases, consumption per capita increases, leading to a positive coefficient for adjacent state price.

[Key to Variables Exhibit Omitted in Printing]

This is a crude procedure compared to that of Wales (1968), who measured population within various distances from the border of each state. However, the Wales border-crossing variable is not only costly to reproduce and subject to arbitrary measurement (how far from the border is population to be measured and how should major highways be factored in?), but it gave Wales results—zero price elasticity—that are hard to believe. In contrast, our border-crossing variable performs as predicted, correcting the upward bias in price elasticity to a plausible level.

Another major cause of out-of-state consumption is travel due to tourism, business meetings, conventions, and so on. In states and areas where such activities are prominent, such as Nevada, Hawaii, and the District of Columbia, consumption is overstated relative to true resident consumption. Lacking direct measurement of tourism and other out-of-state travel, a proxy measure is used: the percent of state payroll in hotels, motels, and courts. This variable—called tourism—should be positively related to consumption.

Distilled spirit price consists of a weighted average of manufacturer-suggested retail prices for eight leading

brands in each state.[4] The price index probably deviates from actual mean prices, but it nonetheless should provide a reliable rank ordering across states. In states where private-label selling is substantial, mean price is likely to be lower than the index reflects, but the suggested mean price should also be lower in such states. Transaction prices will also differ from suggested retail prices owing to periodic price discounting when discounting is not blocked by regulation. To the extent that discounting is due to regulatory differences across states—such as banning or allowing price advertising—these differences should be captured by our regulatory variables, as explained later. However, a price distortion may arise between monopoly states and private-license states if manufacturer discounts are not passed on to consumers in monopoly states.

Because of "affirmation" laws it may be thought that price differences across states are due solely to differing state tax levels. This is not the case. The correlation in our sample between state distilled-spirits taxes and prices is 0.42, indicating that prices differ for reasons other than tax levels. Prices may vary because of differing demand and supply conditions at the wholesale and retail levels in each state and because of differing market regulations. Certain brands and types of liquor have higher demand in some states than others. Also, where price advertising is allowed, prices should be lower.

The price of a single brand of medium-priced, nationally sold beer is used as the beer price. How representative this price is for all beer in a given state is unknown, although as a medium-priced beer it should track well with mean price. Nevertheless, because a single brand is used, estimates of the price elasticity of demand for beer are expected to be subject to greater error than are those of distilled spirits.

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[4] The brands are: Seagram's 7-Crown, Old Crow, Old Grand-Dad, Dewar's, Smirnoff, Canadian Club, and Beefeater.

Inadequate beer price data has been a persistent problem in studies of the demand for beer in the United States. Horowitz and Horowitz (1965) used state taxes on beer as a proxy for beer price, and found that price elasticity was not significantly different from zero. Weinstein (1983) used tax data, finding very low price elasticity. Hogarty and Elzinga (1972) used a weighed average price of packaged and draught beer by state for Pabst Blue Ribbon and Blatz Pilsner, using data developed in an antitrust case. They found a unitary price elasticity. No general index of beer price by state has been developed to date.

Sociodemographic Variables

Drinking surveys have shown a variety of drinking patterns across sociodemographic groups (Cahalan and Cisin 1976; Cahaan, Cisin, and Crossley 1969). For example, drinking intensity tends to be higher in urban areas, to be highest between the ages of 18 and 44, and to vary across different religious groups. Thus, variables for urbanization, for the percent of population 18 to 44, and for different religious affiliations are included in the model.

These variables are included to avoid specification error. Strong a priori arguments have not been developed to explain why these variables are related to consumption. For example, in considering the finding that there is more drinking in urban areas, one can easily speculate on such economic and sociological causes as higher income, more leisure time, greater cultural acceptance of drinking, a concentration of skid-row alcoholics, and greater peer group pressure to drink. From this list we would emphasize income, and we would expect a strong correlation between urbanization and income, but we recognize that urbanization may represent a summary statistic for non-economic explanations of consumption. Similarly, the reasons why age and religion are related to drinking are not

completely understood, but there are some well known causal factors. For example, the ability of the body to tolerate alcohol declines with age, while religion may signal strong moral convictions and peer group pressure against excessive drinking.

Religious variables by state are available for Christian religions only. Population-religion variables were constructed for Protestants, Catholics, Southern Baptists, and Latter-Day Saints. Because of their proscriptions against alcoholic beverages, the latter two denominations were combined into a single variable with an expected inverse relationship to consumption. Finer designations—of liberal or conservative Protestants, for example—were not possible. No a priori hypotheses are offered for Protestants and Catholics, although religious groups in general are likely to be more opposed to excessive drinking than are secular groups.

In addition to these sociodemographic variables, a variable measuring mean temperature is included in the expectation that distilled spirits are consumed more in cold climates and beer is consumed more in warm climates.

Regulatory Variables

The regulatory variables can be divided into four categories: retail availability, price controls, advertising restrictions, and ownership control.

Retail Availability. Retail restrictions include minimum age, number of outlets, legality of Sunday sales, legality of drug store and grocery store sales, and the existence of local option votes in dry versus wet counties. Minimum age is expected to be inversely related to consumption. The effect may not be substantial since drinking by 18 to 20-year-olds is not likely to be a large percentage of total drinking. Moreover, illegal drinking by underage youth may be widespread, cancelling out legal age differences. However, in terms of the two

beverages examined, minimum legal drinking age is expected to influence beer consumption more than distilled spirits consumption. Beverages lower in alcohol content tend to be lower in price, leading to a greater quantity demand—especially among low-income, younger drinkers.

The number of liquor outlets is measured in two ways: on-premise and off-premise. In states where it is legal for a single outlet to have both on- and off-premise sales, on- and off-premise are combined. Number of outlets is not a purely exogenous variable, since it is a function of the demand for alcoholic beverages in a given area. Thus, a positive relationship is expected, but the direction of causality is ambiguous.

Availability is also determined by sales in nonliquor stores, such as drug stores and grocery stores. Such sales are legal in certain license states, where in most cases, both drug and grocery stores are licensed to sell. As with the number of liquor outlets, since drug store and grocery store sales are not strictly exogenous variables, the meaning of a positive relationship obtained with them is ambiguous. It is interesting to include number of outlets and sales in nonliquor stores in the analysis despite this identification problem because alcohol reformers consider them to be major determinants of demand.

Off-premise Sunday sales are expected to be positively related to beer consumption and unrelated to distilled spirit consumption. Since spirits are easily stored, a ban on Sunday sales will likely affect the purchasing pattern of spirits but not the quantity of spirits consumed. Beer is not so easily stored: it is bulkier and needs to be refrigerated prior to consumption. The acts of purchasing and consuming it are generally more proximal. Thus, spontaneous decisions to drink beer on Sundays at picnics, ballgames, barbeques, beach parties, and the like can be adversely affected by a Sunday sales ban.

Legal option refers to the constitutional legality of counties voting for or against restricted sales. It is used

as a proxy for the existence of dry counties and for strong public sentiment against drinking. It is expected to have an inverse relationship to consumption.

Price Controls. Regulations that have the potential to restrict price competition are a chief concern of this study. State governments regulate price competition by means of wholesaler and retailer price-posting ordinances,[5] mandatory markup policies, and mandatory resale price maintenance.[6] In modeling these controls, mandatory resale price maintenance and markups are assumed to have identical effects: restrictions on price competition and higher prices. Price posting on retail prices is also assumed to be equivalent to resale price maintenance since it prevents retailers from lowering prices below posted levels (although the levels can be changed, generally on a monthly or quarterly basis). A composite dummy variable is thus used to reflect price fixing above competitive levels. If a state has mandatory resale price maintenance, mandatory markups, or price posting at the retail level, it is regarded as having resale price maintenance. This variable is expected to be negatively associated with consumption. Price posting also exists in some states at the wholesale level. Such information availability among a small group of nonexclusive-dealing wholesalers can facilitate price conspiracies. Evidence in support of whole-

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[5] Price posting refers to a legal requirement for each manufacturer to post its wholesale and/or retail price with the state alcohol beverage commission, usually on a monthly or quarterly basis, and to maintain those prices for a fixed period of time. This eliminates intrabrand as well as interbrand price competition for the fixed price control.

[6] Another means of influencing price is through tax policy. Excise taxes vary widely across states, ranging in 1978 from $1.50 per gallon in New Mexico, Maryland, and the District of Columbia to $4.75 per gallon in Florida for distilled spirits. Beer excise taxes in 1978 ranged from 2 cents per gallon in Wyoming to 77 cents per gallon in South Carolina. Since excise tax is reflected in the price variable, no separate variable for excise taxes is required.

saler collusion would result in an inverse relationship between wholesale price posting and consumption.

Advertising Restrictions. The main advertising media under state control are print (local newspapers and magazines), outdoor (billboards and signs), and point-of-purchase (in-store displays, window advertising, and "giveaway" novelties). Advertising restrictions consist of limitations on content (references to children, motherhood, Santa Clause, or price), value of novelties, and size of signs, as well as prohibition of contests, games, and prizes—and in some cases, total prohibition of advertising.

Critics of liquor advertising are concerned chiefly with the content of advertising messages, the total amount of advertising, and the advertising of price. Modelling content is beyond the scope of this study, and data on dollar advertising by state are unavailable. Therefore, our analysis is limited to whether billboard advertising is prohibited, whether novelties can be used, and whether price advertising is allowed in print and outdoor advertising. The effect of banning print advertising could not be tested: since only two states prohibit its use, there was insufficient variability across states.

Our a priori hypothesis holds that advertising's main effect is on intra-industry sales (shifts in sales across brands) and not on industry demand. There is little evidence of a positive relationship between industry advertising and industry consumption in alcoholic beverages (Duffy 1982; Grabowski 1976; McGuinness 1980). Therefore, no significant relationship between the presence or absence of nonprice advertising and per capita consumption is expected. Exceptions to this are novelty giveaways, since these allow discounts in kind, lowering real price. In contrast to nonprice advertising, the absence of price advertising will increase consumer search costs, raising the mean and variance of prices and reducing consumption. Conversely, in states where price

advertising is allowed, price should be lower and consumption greater. This indicates a positive relationship between price advertising and per capita consumption.

Ownership Control. The final regulatory variable is whether a state is a monopoly state; that is, whether it owns and operates the wholesale and retail distribution system or licenses private individuals and firms at the wholesale and retail level. Numerous studies have tested for consumption differences between monopoly and license states, with most finding no significant difference when holding price, income, etc. constant (Morin 1966; Popham, Schmidt, and de Lint 1978; Simon 1966). Curiously enough, no prior studies have offered a hypothesis for why consumption should differ between monopoly and license states.

One reason for differing consumption is that nominal prices tend to be lower in monopoly states, suggesting greater consumption in such states. This pattern of lower prices deserves an explanation because early justification of the monopoly system centered on keeping prices high —at profit-maximizing levels—to discourage consumption. Simon (1966) argued that lower prices in monopoly states might result from lower operating costs due to fewer, more efficient stores (for example, resale price maintenance in license states encourages large numbers of inefficient stores) or from some unexplained institutional bias toward lower prices, such as a belief that current revenues are "satisfactory" or "fair." Peltzman (1971) offers another explanation, arguing that "Government firm management will use prices to confer benefits on voters in return for effective political support for the enterprise and its management." Since tax liabilities and purchases differ across voters, all voters will not gain from a lower price. But if a sufficient number of voters can be given a price reduction that exceeds their tax liability, then prices will be lower. Peltzman maintains that in low-priced whiskies, prices are lower in monopoly

states than in open states, providing greater benefits to low-income groups.

Whatever the reason for lower prices in monopoly states, holding everything else constant, lower prices should lead to greater consumption. But as just noted, most studies find no difference in consumption. The question is whether after holding price, income, religion, etc. constant, there is a basis for hypothesizing lower consumption in monopoly states because of the form of ownership.

Form of ownership can clearly change the incentives of managers and employers. By limiting competition and severing the link between profits and rewards for managers, monopoly systems will reflect a totally different operation, changing the real price to consumers. For example, brand selection is greatly restricted in monopoly states, with state stores carrying only leading brands. By not carrying private-label and cheaper brands available in license states, monopoly states restrict consumption. In addition, shopping costs are, in general, higher in monopoly states: there are far fewer outlets—about a third of the outlets available in license states, on average; store hours are greatly restricted; and in-store layouts and product displays in some monopoly states make brand selection a costlier process. Contrary to studies based on list prices, monoply states effectively raise the true price to consumers. This should result in lower consumption in monopoly states.

Sample and Parameter Estimation

The sample for distilled spirits was constructed from observations made on 50 states plus the District of Columbia during the years 1974-1978 and resulted in 255 observations. For beer, price data were missing in two states, Hawaii and Alaska, and were only available for the years 1976-1978, yielding an initial sample of 147 observations. We chose a pooled time-series cross-

section sample in order to have sufficient degrees of freedom, given the large number of explanatory variables, and because we anticipated multicollinearity problems. A Chow test for pooling across years on the distilled spirits sample yielded an F-ratio of 0.195, insignificant at the 0.01 level, indicating that model homogeneity across years cannot be rejected. A similar test for the beer sample produced an F-ratio of 0.182, which is also highly insignificant. Since the primary variation is across states and not over time, we made the assumption that the 1976 beer-price data were applicable for 1974 and 1975 (using 1974 and 1975 beer-price deflators), making the number of beer-price observations compatible with all other variables.

Parameter estimation was done using ordinary least squares (OLS), ordinary least squares with dummy variables (OLSDV), and variance components (VC) methods. These methods imply different assumptions about the stochastic structure in the pooled time-series cross-sectional design. When using OLS, the error term is assumed to be totally stochastic across states and over time. At the other extreme, OLSDV assumes the existence of a fixed intercept for every state, capturing all state-specific effects that are not in the model. Finally, VC assumes a random intercept for each state; this places VC in between no state specific effects (OLS) and fixed state intercepts (OLSDV).

The reported findings are based solely on OLS estimation for two reasons. First, OLSDV could not provide unique estimates of the state intercepts because of apparent linear combinations between some intercept and regulatory dummy variables. Second, the assumption of random intercepts, implied by the VC method, is difficult to justify when one models the entire population of cross sections (Judge et al. 1980, p. 331). Indeed, the primary objective of the empirical analysis is to explain differences in per capita consumption across all states;

thus the fifty-one cross sections are not a random sample of a large population. The VC estimates, which are very close to the OLSDV estimate of the slope coefficients, were occasionally meaningless (e.g., nonsignificant price effects, probably because of collinearity between the random intercepts and some explanatory variables (Judge et al. 1980, pp. 336-338). While the OLS results may overstate somewhat the significance levels of some estimates, they are very stable, and for the most part, economically plausible.

EMPIRICAL RESULTS

Distilled Spirits

The regression results for the full sample are in Table 1 and for license states only in Table 2. We divided the total sample in this manner, since certain regulatory variables—drug and grocery stores, resale price maintenance, etc.—are applicable only in license states. Three or four regression equations are presented for each sample tested. Multiple regression runs were used to illustrate the stability or sensitivity of the parameters in light of the presence of collinearity. Certain variables are collinear—print-price and billboard-price advertising, income and youth, and resale price maintenance and wholesale price posting. As a consequence, certain collinear variables were selectively deleted to test the sensitivity of the results to multicollinearity.

All States. Table 1 shows that price is highly significant. The coefficient of price suggests that demand is price-inelastic, but in almost every case the coefficient is not significantly different from one at the 0.05 level. There is, however, some confounding between price and adjacent-state price because price appears in the adjacent-state price variable as well. However, the net effect of adjusting price for its component in adjacent-state price is to raise the price coefficient about 0.06; that is, closer

to —1.0. In the absence of holding adjacent-state price constant, price would be biased upward, and in fact, when adjacent-state price is dropped from equation 1.1 (see Table 1), the price coefficient rises to —1.085. But clearly, there is a significant adjacent-state price effect, requiring its inclusion. In short, holding constant adjacent-state purchasing effects, price elasticity is approximately unitary.[7]

[Table 1 Omitted in Printing]

The other economic variables—income and tourism—are consistently positive and significant, as expected. Income is inelastic, a finding consistent with previous studies (Ornstein and Levy 1983). Tourism is highly significant in each case and is the most important variable in terms of explaining variation in consumption.

The sociodemographic variables are all significant and have the expected sign, except youth, which is insignificant. Urbanization is positive, which is consistent with previous studies. Youth is insignificant in each equation in Table 1, suggesting that distilled spirits consumption is unrelated to the age distribution of the population. Youth and income, however, are strongly correlated, which obscures the results for youth. When income is dropped, youth becomes positive and significant. However, the causal meaning of youth is unclear, since youth is a proxy for such determinants of drinking as income, tastes, and physical capacity to handle alcohol.

The religious variables are all negative and significant, supporting the view that religious affiliation fosters less drinking. Contrary to our expectation that the Baptist variable would show the strongest relationship, Protestant

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[7] Previous price elasticity estimates for distilled spirits in the United States range from 0.0 to —2.0, while estimates for European countries are typically less than —1.0 (Ornstein and Levy 1983). The results of any given study for the United States seem highly sensitive to the sample tested and also to the specification of the model and the method of estimation.

appears to have the largest effect; however, the size of Protestant's coefficient and level of significance is the most erratic of the three religious variables across the models tested. Thus, although we cannot establish which religion has the strongest effect, Christian religious affiliation as a whole is consistently inversely related to consumption, as expected. Temperature, the last variable in the sociodemographic category, is negative and highly significant, supporting the a priori expectation that the consumption of distilled spirits is greater in colder climates.

The regulatory variables present a mixture of significant and insignificant results, although as a group they are significant. The group significance should not be overstated, however; as we will show, one significant variable (billboard advertising) has a contrary sign, and a second significant variable (number of licenses) has an ambiguous relationship to consumption. Minimum age, Sunday sales, and local option are all generally unrelated to consumption. The minimum age result is consistent with prior findings (Barsby and Marshall 1977) and suggests that youthful drinkers tend to prefer beer and wine to distilled spirits. The Sunday sales variable is significant in equations 1.2 and 1.3 (see Table 1), but has the wrong sign. The on-premise licenses per capita variable is consistently positive and significant, but as indicated before, the direction of causality between consumption and licenses is ambiguous. When the off-premise licenses variable is used, it is insignificant. This results from its high correlation with monopoly of —0.75. When licenses are deleted there are no major changes, although Catholic is only marginally significant.

The price-advertising variables (bans on print and billboard-price advertising) are both positive and significant in equations 1.2 and 1.3, respectively (see Table 1). This finding supports the view that price advertising leads to lower price and higher consumption. In a separate study, it was found that absence of price advertising raised mean

price approximately three percent (Ornstein and Hanssens 1984). In contrast, general advertising on billboards shows perverse results, since the sign of billboard is counterintuitive. The novelty giveaways variable is positive, indicating a lower effective price and thus higher consumption. However, its significance is sensitive to the inclusion of off-premise outlets and Catholic affiliation.

The last regulatory variable—monopoly states—is negative and significant, indicating that consumption is approximately 8 to 12 percent lower in monopoly states after holding all other variables constant. This finding suggests that there is something unique occurring in monopoly states beyond the factors that have been controlled for that leads to lower per capita consumption. As indicated earlier, in the absence of competition and the ability to share in profits, demand-increasing efforts are reduced. This is reflected in number of outlets, convenience of store hours, brand availability, and lack of promotion relative to private license outlets.

The economic and sociodemographic variables, then, account for most of the explained variation, indicating the relative unimportance of the regulatory variables. Moreover, price, income, and tourism are the variables with the largest elasticities, while the regulatory variables have the smallest elasticities. Lack of explanatory power coupled with low elasticities indicates that manipulation of regulatory variables is likely to have a very minor impact on the consumption of distilled spirits, unless they indirectly affect price.

License States. The purpose of the license-state regressions is to test regulatory variables unique to license states—namely, resale price maintenance, wholesale price posting, and legality of sales in drug and grocery stores (see Table 2). The results show drug-store sales to be insignificant in each regression, but grocery-store sales (equation 2.2) to be positive and significant. Resale

price maintenance is negative and generally significant, as expected, supporting the usual inverse relationship between consumption and price. Wholesale price posting is negative but insignificant in most cases, providing no support for the hypothesis that price posting facilitates wholesaler collusion. The correlation between resale price maintenance and wholesale price posting (equal to 0.52), does not influence this finding: in unreported regressions, resale price maintenance remains negative and significant when price posting is deleted and price posting remains negative and insignificant when resale price maintenance is deleted. The results on some of the remaining variables for license states differ from those for all states. This is not unexpected, since the variance of the estimates and collinearity worsen with the smaller sample.

[Table 2 Omitted in Printing]

To summarize the results on regulatory variables, for all states price advertising, novelties, and monopoly-license distribution are significantly related to consumption, but the significance of novelties is sensitive to collinearity. In the case of license states, resale price maintenance and novelties are related to consumption. Other regulatory variables such as minimum age, Sunday sales, drug-store sales, wholesale price posting, and total billboard-advertising bans are either unrelated or perversely related to consumption. Moreover, the regulatory variables explain a minute proportion of consumption and have very small elasticities. This suggests that regulatory changes, outside of those that impact on price, have little or no affect on consumption.

Beer

All States. Price and income have a far less significant impact on beer consumption than on distilled spirits consumption. As Table 3 shows, for all states the demand for beer is highly price inelastic. (Prior studies found price elasticities clustering around —0.3 to —0.4; Ornstein and Levy 1983). The adjacent-state price variable

is not included on the assumption that a low-price, high-bulk item like beer does not justify interstate travel. Income is unrelated to beer consumption (this is also consistent with prior beer demand studies). However, the results on income are obscured by collinearity with youth. When youth is omitted, income becomes positive and marginally significant. Tourism is, once again, highly related to consumption.

[Table 3 Omitted in Printing]

Results for the sociodemographic variables for beer show major changes from the results for distilled spirits. Youth is now strongly positive and significant, with the highest elasticity of all the variables. The importance of youth is reinforced in the minimum-age variable, which shows that the lower the minimum age, the higher the beer consumption. These two variables indicate the crucial importance of age distribution to the consumption of beer. The contrast between the significance of youth to beer and the insignificance of youth to distilled spirits is striking, supporting the view that youthful drinkers prefer beer. Another major change from results for distilled spirits is that the religious variables for beer are now positive and significant. This is unexpected in the case of the Baptist variable, since it measures Baptist and Latter-Day Saints affiliates, and since neither religion allows the drinking of any kind of alcoholic beverage. This positive association suggests that religious proscriptions do not include beer, or that if one cheats, drinking beer is perhaps less sinful than drinking distilled spirits. Finally, temperature is unrelated to beer consumption, providing no support for the hypothesis that beer consumption is greater in warmer climates.

The regulatory variables are again significant as a group but offer mixed results for each individual variable. Number of outlets presents a measurement-error problem since we do not have data on beer-license-only outlets. Off-premise licenses for the sale of beer only, for example,

are common in monopoly states. Lacking such data, the number of on-premise outlets was judged to be more reliable for beer, although some states issue on-premise licenses for beer and wine only. Nevertheless, the number of on-premise outlets is positive and significant, as was the case for distilled spirits.

A unique finding for beer is the positive and significant relationship of Sunday sales to consumption. This supports our a priori hypothesis that beer consumption is more a function of immediate availability due to higher storage costs. Local option is marginally significant in the case of beer versus distilled spirits.

Billboard advertising is insignificant in most regressions, consistent with the hypothesis that advertising's primary influence is on individual brand shares and not on industry demand. Novelty giveaways is insignificant for beer in contrast to distilled spirits. Separate regressions to test for the sensitivity of billboard advertising and novelty giveaways to collinearity resulted in no changes. Price advertising is positive and significant for billboard but not for print advertising, giving partial support to the search theory of advertising in the case of beer. The last difference between beer and distilled spirits results is that monopoly is insignificant for beer, indicating no difference in consumption between monopoly and license states. This last result may be due to the large number of beer-only outlets in monopoly states.

License States. The license-states results in Table 4 show that resale price maintenance is negative and marginally significant, which is consistent with the results for distilled spirits. Wholesale price posting is consistently negative and highly significant for beer, in contrast to the findings for distilled spirits. Because of collinearity between resale price maintenance and wholesale price posting, separate unreported regressions were run, but no changes were found.

Thus, the major differences between the beer and distilled spirits results are as follows:

- Beer consumption is strongly related to youth, but distilled spirits consumption is unrelated to youth. Price and income are far more inelastic for beer demand than for distilled spirits demand.
- Religious affiliation tends to be associated with greater beer consumption but lower distilled spirits consumption.
- Availability on Sundays is important to beer consumption but not to distilled spirits consumption.
- Beer consumption is not significantly different between monopoly and license states, in contrast to distilled spirits consumption.

SUMMARY AND CONCLUSIONS

The main determinants of interstate differences in per capita consumption of distilled spirits are price, income, and interstate travel—not differences in alcohol-control laws. Control laws are either unrelated to distilled spirits consumption, as in the cases of minimum legal age and Sunday sales, or are related but with very low elasticities, as in the cases of resale price maintenance and print and billboard price advertising. This suggests, not too surprisingly, that control laws affecting price have the greatest impact on consumption. In the case of beer, the primary influence on demand is the youthfulness of the population. Control laws with the strongest relationship to beer are minimum legal age and Sunday sales. Price and income are far more inelastic for beer than for distilled spirits, implying that control laws influencing price will have a relatively lesser effect on beer consumption than on spirits consumption. The practical importance of these findings in terms of reducing drinking externalities is unknown since the relationship between changes in mean consumption and drinking externalities is as yet unknown.

From a public policy perspective these results can be used for a segment-based demarketing of alcohol. Price intervention through tax increases, resale price maintenance, or bans on price advertising will have a much larger effect on spirits consumption than on beer consumption. The history of state excise taxes shows that they are rarely changed, except at times of budgetary crises. Resale price maintenance in alcohol has been on the decline for years and is fast disappearing in light of recent legal rulings.[8] But advertising bans are increasingly being called for. Ten states proposed legislation to ban advertising in 1983, and a variety of public interest groups called on the Federal Trade Commission to restrict the advertising of alcoholic beverages. A ban on price advertising raises the mean and variance of price by increasing search costs, and this results in lower consumption (Ornstein and Hanssens 1984).

Availability by age is a key consumption determinant for beer. Minimum legal drinking age for beer varies across states, with 28 states having below-age-21 drinking standards in 1983. Raising the minimum drinking age to 21, as The Presidential Commission on Drunk Driving proposed in 1983—a federal standard now being forced on states by threat of a loss of federal highway funds—will reduce beer consumption. However, for both beer and distilled spirits the influence of control measures is small relative to that of sociodemographic and economic variables that affect consumers' overall attitudes toward drinking. For example, higher urbanization and increased tourist activity were found to be strongly associated with higher alcohol consumption. Since these phenomena are often observed in modern societies, they suggest that the task of controlling alcohol consumption may not become easier in years to come.

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[8] California Retail Liquor Dealers Assn. v. MidCal Aluminum Inc. et al., 445 U.S. 97 (1980).

Clearly, this study only begins the process of demand estimation for consumer and product segments of alcoholic beverages. With survey data such as that available for cigarette consumption (Lewit and Coate 1982), more detailed relationships can be uncovered. Elasticity could be measured by intensity of user or by more narrowly defined sociodemographic groups—sex, race, education, etc. Social marketing would do well to direct its efforts at individual product lines, not at alcoholic beverages as a whole. Targeting specific consumer segments may be more efficacious than targeting drinkers in general.

[*Received January 1984. Revised November 1984.*]

STATE MONOPOLIES AND ALCOHOLIC BEVERAGE CONSUMPTION

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Abstract

Fifteen states have state monopolies to regulate the retail distribution of distilled spirits or wine. One objective of state ownership is the reduction of consumption. However, previous research supports both no effect and a negative effect of state monopoly (control) states on consumption.

Using improved data on prices, this paper provides a mixture of classical and Bayesian estimates of beverage-specific demand functions. The analysis is carried out at the state level for the year 1982. Independent variables include the real own-price, substitute prices, income, tourism activity, religious sentiment, youth proxy, and several regulatory measures including monopoly control, bans on price advertising, minimum legal drinking age, and restrictions on the number and type of retail outlets.

The results indicate no direct effect of monopoly control on consumption that is separate from effects manifested by higher prices or, for beer, limited outlets. Furthermore, average prices are not significantly greater in the monopoly states. Several possible explanations are advanced to explain these results, including the likelihood that the higher transaction costs in the monopoly states are a tax on consumption of alcohol.

1. Introduction

Following the repeal of Prohibition in 1933, the task of regulating the distribution and consumption of alcoholic

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beverages was left primarily to the states. Each state established its own system of control, but certain common features were broadly shared. All of the states set a minimum legal drinking age, ranging from 18 to 21. All states enacted special excise taxes on alcoholic beverages, and most placed restrictions on advertising, hours of legal sale, number and type of outlets, local "dry area" options, and so forth. Fifteen states created state monopolies to control the retail distribution of distilled spirits.[1] In the remaining 35 states and the District of Columbia, some form of licensing system was adopted to regulate the number and operation of retail outlets. Many of these regulations have recently been the subject of public scrutiny and debate. For example, between 1970 and 1976, 30 states reduced the minimum drinking age, but between 1976 and 1984, 27 of these states again raised the age limit. In California, 50 cities banned the common-site sale of alcoholic beverages and gasoline (McCarthy and Umbeck 1988), while Kansas voters recently amended the state constitution to permit liquor-by-the-drink (Hersch and McDougall 1988). The state of Iowa terminated its retail monopoly in 1987, but a similar proposal was defeated in Pennsylvania.

Arguably, state liquor monopolies are established and maintained for two reasons. First, as an attempt to ameliorate certain undesirable side-effects of alcohol consumption, states may institute public ownership of retail liquor stores. The absence of a private liquor lobby, for example, makes it easier to enact legislation which limits advertising, sales to youth, number of outlets, and hours of operation. Second, a liquor monopoly may be a pre-

[1] The control states are listed in table 1. The states of Michigan, Mississippi, and Wyoming primarily control wholesales through state-owned warehouses which sell to private retail establishments. These states are included among the license states. Retail stores in Oregon are operated by independent contract agents. This state is included among the control states.

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ferred alternative to an excise tax as a means of generating revenue for the general fund. This occurs if a state monopoly permits a greater degree of control of alcoholic beverage prices and costs (Simon 1966) or because there are political advantages to differential rates of taxation across beverages, brands, and customer groups (Peltzman 1971).

This paper examines the effect of state monopolies and other regulations on the consumption of distilled spirits, wine, and beer. I attempt to determine how and to what extent monopoly-control states have been successful in limiting alcohol consumption. In contrast to earlier studies, I examine this basic question for all three types of alcoholic beverages. In eleven of the states, wine retailing is also subject to monopoly control. Retailing of beer is exclusively a private enterprise, although it may be that various laws and the general regulatory climate influence consumption in the monopoly states. I test for the effect of state monopolies on consumption of all alcoholic beverages, which provides some indirect evidence about the second possible motive for this form of regulation.

Previous empirical studies of state monopolies have obtained conflicting results. Simon (1966) found no evidence that distilled spirits consumption was lower in monopoly states after controlling for price, per capita income, and total outlets per capita. Wilkinson (1987) reported similar results for a measure of total alcohol (ethanol) consumption per capita. On the other hand, Zardkoohi and Sheer (1984) and Ornstein and Hanssens (1985) reported diminished levels of distilled spirits consumption in the monopoly states. The latter study also found that beer consumption was not significantly different between monopoly and private-license states. None of the above studies consider wine consumption.

Each of the above studies is subject to various criticisms. The number of explanatory variables considered

in Simon (1966) and Zardkoohi and Sheer (1984) is very limited. On the other hand, Wilkinson (1987) and Ornstein and Hanssens (1985) have such a large number of variables in their regressions that multicollinearity must be a problem.[2] In addition, Wilkinson's use of total ethanol consumption is inappropriate for regulatory analysis and Ornstein and Hanssens employ price data which are either currently unavailable (distilled spirits) or proprietary (beer).

While the amount and quality of the price data has been limited in earlier studies, both Simon (1966, 189) and Zardkoohi and Sheer (1984 1075) reported lower average distilled spirits prices in the monopoly states. Furthermore, there is ample evidence to indicate fewer outlets per capita in the monopoly states (Simon 1966, 192; Zardkoohi and Sheer 1984, 1071; table 1 below). Limitations on the number of outlets, plus other monopolistic restrictions on brand selection, hours of service and advertising, will raise the true or full cost of alcoholic beverages in monopoly states. Hence, even if monetary prices are lower, the net effect of monopoly control may be to reduce consumption. This hypothesis will be tested in the present study using an econometric technique which avoids the "data-mining" approach exemplified in Wilkinson and in Ornstein and Hanssens.

The present study differs, therefore, in several important respects from the earlier studies. First, retail transactions prices are used in cross-sectional demand functions for

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[2] Simon (1966) reports regression containing six or seven regressors and Zardkochi and Sheer (1984) report results for four regressors. In contrast to these studies, Ornstein and Hanssens (1985) considers 26 regressors and Wilkinson 17 regressors. In Zardkoohi and Sheer (1989, 1073) the dummy variable for monopoly control has t-values of 1.90 and 1.71, which indicates statistical significance in a one-tailed test only. In Ornstein and Hanssens (1985, 207), the dummy variable for monopoly control has t-values of 3.05, 2.12, and 2.19.

beer, distilled spirits, and wine. Second, a Bayesian method is used to deal with the econometric problems of specification uncertainty and multicollinearity. Third, the estimates for wine are unique. In addition, empirical problems are discussed and dealt with for cross-border purchases, adjacent-state price competition, and shipment-based consumption estimates. In the remainder of the paper, Section 2 describes the price and consumption data and presents some descriptive statistics comparing monopoly control and license states. Section 3 contains the general model specification. Section 4 discusses the econometric techniques employed and presents the empirical results. Section 5 summarizes the main finding and discusses some economic implications of state monopolies.

2. Beverage Prices, Consumption, and Outlets

A number of economic studies provide estimates of price and income elasticities of demand for alcoholic beverages.[3] A major problem in earlier studies has been the availability of data on retail transactions prices for alcoholic beverages. Cross-sectional beer demand studies have used state taxes on beer as a proxy for price differences (Horowitz and Horowitz 1965; Weinstein 1983), wholesale prices provided by manufacturers and other confidential data sources (Hogarty and Elzinga 1972; Schweitzer, Intriligator, and Salehi 1983; Ornstein and Hanssens 1985), and average price estimates from the trade publication *Beverage World* (Uri 1986). None of these measures provided higher R^2 in preliminary regressions or could not be replicated for disclosure reasons.

Separate studies of the demand for wine in the United States have been rare, especially cross-sectional studies by state. Folwell and Baritelle (1978) employed survey panel data from the National Purchase Diary Corporation for 1975. More recently, Heien and Pompelli (1989)

[3] For surveys and additional evidence, see Grossman, Coate, and Arlock (1987) and Ornstein and Levy (1983).

used the 1977-78 USDA Household Food Consumption Survey. Price data for home consumption of wine and other beverages were constructed from the expenditures and quantities reported by individual households. While these data are useful for estimation of demand systems, they are of limited applicability for studying regulatory effects across states.

Cross-sectional studies of the demand for distilled spirits have been far more numerous because shelf price data by brand can be obtained from surveys conducted by the Distilled Spirits Council of the United States (DISCUS) or Jobson's *Liquor Handbook*. Among the cross-sectional demand studies that have used these data are Wales (1968), Smith (1976), Zardkoohi and Sheer (1984), Ornstein and Hanssens (1985), and Swidler (1986b). However, 1984 was the last year these price data were made available in published form.

Other investigators have aggregated across beverages by converting each type of beverage to its ethanol equivalent consumption (Hoadley, Fuchs, and Holder 1984; Wilkinson 1987). The DISCUS price data are then used to explain total ethanol consumption. This procedure is questionable on several grounds. First, it assumes that people consume a beverage solely for its absolute alcohol content and that the ethanol content of each beverage is similar across brands and states. Second, in order to aggregate in this manner, it must be the case that the relative prices of beverages are constant and can be represented by the average price of distilled spirits. This assumption, while plausible in an aggregate time series (see Levy and Sheflin 1983), is questionable on a state basis, due to differences in tax rates and allowable mark-ups. Third, empirical results reported here and elsewhere indicate significant differences in price and income elasticities by beverage. These and other beverage-specific differences cannot be recovered from studies which aggregate by ethanol content.

The price data used in the present study are obtained from the quarterly price survey Inter-City Cost of Living Indicators, published by the American Chamber of Commerce Researchers Association (ACCRA).[4] The ACCRA survey covers 59 goods and services, including three alcoholic beverages. City chambers of commerce participate in the survey on a voluntary basis, gathering local retail price data from telephone, letter, or in-person surveys. Regional coordinators review the data for consistency. The number of cities participating exceeds 225, thereby producing a wide base of data on cities of all sizes in all geographic areas of the country.

Alcoholic beverage prices in the survey include the price per six-pack of beer (Schlitz or Budweiser brand) in 12-oz. containers, the price per 750-ml. bottle of Seagram's Seven-Crown whiskey, and the price per 750-ml. bottle of Paul Maisson Chablis wine. I assume that prices for these popular brands will track well with the mean price for each beverage type. The beer price used here is a city-population weighted-mean price for the second and third quarter of 1982, while the spirits and wine prices are city-population weighted-mean prices for all four quarters of 1982. Cities which reported only once were excluded from the latter calculations. Alaska and Hawaii are excluded due to lack of necessary data.

The consumption estimates in the present study are based on shipment data reported by the leading industry trade publications (see the data appendix). These data have been the subject of some criticism by Cook (1981). First, they exclude illegal and home production, but there is no evidence that such activities are currently important. Second, wholesalers may underreport their sales in order

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[4] More extensive discussions of the ACCRA survey data can be found in Healy and Cox (1982) and Hogan and Rex (1985). Because the ACCRA cost-of-living index does not include taxes, I use the broader-based BLS cost-of-living index for major metropolitan areas as a deflator for prices and income by state.

to evade state taxes, thus biasing shipment data downward in high tax states. These illegal activities have been investigated by Smith (1976), but with generally inconclusive results as to their importance. Third, some residents of a state may obtain alcoholic beverages from an adjacent state if the price differences between the two states make this activity worthwhile. Empirical issues associated with adjacent-state price competition are discussed below. Fourth, shipments made to a given state include sales made within that state to non-resident visitors and tourists. Empirical solutions to this problem are also discussed below.

An alternative data series for alcoholic beverage consumption has been derived from state excise tax data by Doernberg and Stinson (1985). Examination of these data reveal that they differ little from shipment-based consumption estimates. For beer, the simple correlation (r) between shipment-and tax-based consumption estimates is $r = 0.989$. The distilled spirits and wine data in Doernberg and Stinson are a mixture of industry shipment- and tax-based estimates. A few states show significant differences for unknown reasons, but industry consumption data are highly correlated with the Doernberg and Stinson data ($r = 0.993$ for spirits and $r = 0.992$ for wine). I have chosen to use the industry data for comparability with earlier demand studies.

Various descriptive statistics for consumption, prices, and outlets are displayed in table 1. In order to reflect some degree of underage drinking, all per capita consumption estimates are for persons aged 16 and over. I assume that beverage demand functions are homogeneous of degree zero in prices and income. Therefore, all price and income variables in this study are expressed in real terms by deflating by a geographic cost-of-living index derived from the broadly based BLS family budget survey of Fall 1981. Previous studies that use undeflated prices and income variables may find significant results for

selected variables which happen to be correlated with state cost-of-living differences.

Table 1 shows that per capita consumption of each beverage is lower on average in control states compared to license states, but the differences are not statistically significant. Mean real prices for beer and wine are identical across samples. Real spirits prices are higher in control states, but the difference is again not statistically significant. The variance and range of prices for each beverage are less in the control state sample, reflecting price affirmation and other uniform pricing policies (see Swidler 1986a). Total outlets and off-premise outlets per capita are significantly less in the control states, although the same is not true for on-premise outlets. A major difference between the two types of regulation is therefore availability of alcoholic beverages from retail stores. The next section investigates the effect of availability and other variables on beverage consumption. I attempt to determine which types of regulations are important, based on a rigorous reporting method for alternative specifications of the regression model.

[Table 1 Omitted in Printing]

3. Model Specification

The single-equation cross-sectional demand model, estimated separately for beer, spirits, and wine, has the following general form:

$$\log Q_{ij} = a_i + b_i \log P_{ij} + c_i \log S_{ij} + d_i \log Y_j + e_i R_{ij} + f_i C_{ij} + u_{ij}$$

where Q_{ij} is per capita consumption of the i-th alcoholic beverage in the j-th state, P is the real own-price, S is the real price of a substitute beverage, Y is real per capita disposable income, R is a set of regulatory variables affecting availability and information, and C is other cultural and demographic variables thought to condition the consumption of a given beverage. The regression coefficients for the i-th beverage are given by a_i through f_i, and u is the error term. Theoretically, P, S,

and Y are the main variables that constrain the consumption opportunity set of all individuals. The R and C variables apply more selectively because of state differences in legal, cultural, or demographic conditions.

The dependent variable in (1) is mean per capita beverage consumption, denoted by *BEER*, *SPIRITS*, or *WINE* for persons aged 16 and above in the year 1982. The major economic variables consist of the mean real own-price (*OWN-PRICE*) of beer, spirits, or wine for 1982 or selected quarters thereof, mean real per capita disposable income (*INCOME*) averaged over the entire state population, a proxy variable for state tourism activity (*TOURISM*), and the mean real price of a substitute beverage (*SUB-PRICE*).[5] For obvious reasons, the expected coefficient signs on the first three variables are negative, positive, and positive, respectively. However, previous studies have found no consistent evidence on substitutability among alcoholic beverages because the high correlations among beverage prices usually limit the ability to detect substitution relationships (Ornstein and Levy 1983, 341). For example, in the present study the correlation between beer and spirits prices is 0.630, between beer and wine, 0.697, and between spirits and wine, 0.714. A Bayesian approach, discussed below in Section 4, is used to deal with this problem.

Beverages sold in adjacent states are potentially close substitutes for a home state's retail beverages. Since Wales's (1968) initial discussion of the problem of adjacent-state price competition, several empirical solutions have been proposed. Smith (1976) suggested the use of the lowest adjacent-state price expressed relative to the home state's own-price. Ornstein and Hanssens (1985) used the same variable deflated by the geographic size of the home state. Smith's variable is correlated with the

[5] The price of beer is used as the substitute price for spirits and wine, while the price of spirits is used as the substitute price for beer.

home state's own-price (for spirits the correlation in the present study is r=0.652), and deflating by areal size produces a highly skewed distribution. The use of the lowest adjacent-state price is also misleading, since there are only nine states in the 1982 sample that dominate all adjacent states by virtue of lower spirits prices. For the majority of the states, with both lower and higher adjacent prices, the effect on consumption of interstate purchases is uncertain. However, as pointed out by Swidler (1986a), adjacent-state price competition is expected to occur more frequently in those control states that practice uniform pricing within their borders. In these states, direct market forces cannot equalize transportation-adjusted prices and, as a consequence, interstate spirit purchases are more likely to have an effect on measured home state consumption. In the present study, the effects of adjacent-state price competition is captured in a control state dummy variable.

Four regulatory variables are considered in the model. The first is a dummy variable equal to one for control states (*CONTROL*). Control states typically have more limited availability of outlets, brand selection, hours of business, and so forth. These restrictions raise the full costs of spirits and wine. Because of uniform pricing, more interstate purchases are likely to be made by residents of control states. Both of these effects reduce state consumption and are expected to produce a negative coefficient sign on *CONTROL* for spirits and wine. This variable is also included in equation (1) for beer. The sign is uncertain. It will be negaive if monopolistic controls extend to beer, but positive if these controls control lead to higher transaction costs for substitute beverages.

The second regulatory variable is the total number of outlets per capita (*OUTLETS*). A larger number of outlets reduces transaction costs of beverages, and *OUTLETS* should therefore have a positive coefficient sign. The variable specification employed here is total outlets

per capita, which includes both on- and off-premise outlets.[6] Control states have fewer total outlets per capita and they especially restrict the number of off-premise outlets.

Availability of alcohol is also influenced by the legality of sales in nonspecialty stores, such as grocery or drug stores (*STORE*). For beer and wine, *STORE* is a dummy variable equal to one if legal sale is permitted in grocery stores. For spirits, *STORE* is a dummy variable equal to one if legal sale is permitted in drug stores. A positive sign is expected on *STORE*, reflecting a reduction in per unit transaction costs of shopping trips.

Some states limit the availability of beverage information by banning billboards or preventing price advertising on billboards or in printed media. I include a dummy variable equal to one if the state bans price advertising in printed media (*ADBAN*). The expected coefficient sign is negative. On theoretical grounds, bans on price advertising should raise consumer search costs, thereby lowering consumption and raising the mean and variance of prices.

The last regulatory variable is a dummy variable (*AGE*) for minimum legal drinking ages (MLDA). Previous studies have encountered difficulty in obtaining significant results for an age variable (see Hoadley, Fuchs, and Holder 1984; Ornstein and Hanssens 1985). These authors suggest that drinking by persons less than 21 is simply not quantitatively important relative to total consumption or that the limited variability of age variables prevents cross-sectional examination. Use of a dummy variable has several potential advantages over

[6] This specification is adopted because of possible reporting errors in these data. The basic results are unchanged if outlets are divided into on- and off-premise outlets. Because the number of outlets may be endogenous, these variables were all lagged one year. However, in most jurisdictions the number of outlets is based on population and not on per capital consumption.

previous studies. First, age laws are discrete and categorical in nature. Second, dummy variables probably do a better job of capturing the effect on consumption due to border crossing by underage youth from adjacent states. Third, states with a common drinking age may possess other common characteristics which are difficult to measure, such as operation of drinking establishments that appeal to youth. The specification used in this study is *AGE* equals zero if the MLDA is 21 and is equal to one otherwise.[7] In general, the overwhelming importance of beer as the drink of choice among youth means that the effect of *AGE* may vary across beverages, but its sign should be positive for beer.

Previous demand studies have included a host of state cultural and demographic variables including temperature, urbanization rate, population density, employment and occupation status, ethnic origin, race, religion, age distribution, and unemployment rate. Only the last three variables are considered because most sociodemographic measures tend to be highly correlated with either prices or income. Two major religious groups, Southern Baptists and Latter-Day Saints, have proscriptions against the consumption of alcoholic beverages. The influence of religious beliefs on drinking sentiments is measured by the percentage of a state's population who report themselves to be adherents to the Southern Baptist or Latter-Day Saints religions (*RELIGION*). The expected sign is negative. In addition, because the drinking preferences of youth are often thought to differ from the rest of the adult population, the demand equations include a variable for the percentage of a state's population between the ages of 16 and 24 (*YOUTH*). The expected coefficient sign for *YOUTH* is positive for beer, reflecting both legal and illegal drinking behavior. The effect on

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[7] The variable *AGE* is specified by beverage. In 1982, the legal drinking age was 21 in fourteen states for beer, twenty-four states for spirits, and twenty states for wine.

other beverages is uncertain if increased consumption of beer also has a positive demonstration effect on consumption of wine or spirits.

Lastly, McCornac and Filante (1984) present evidence indicating that spirits consumption is greater when a state's unemployment rate (*URATE*) increases. They suggest that the cost of unemployment must be extended to include the social costs of increased consumption of distilled spirits. The present study attempts to replicate their findings for all three types of beverages in a cross-sectional context. The expected coefficient sign on *URATE* is positive, ceteris paribus.

4. Econometric Methods and Empirical Results

A number of studies of economic regulations employ state cross-sectional data. The natural experiment created by economic, political, and cultural differences among the states leads to a variety of outcomes with respect to the type, timing, or severity of regulations. Earlier studies of alcoholic beverage consumption typically consider numerous explanatory variables. However, econometric studies using state-level data are forced to employ small samples with restricted variation, and this can create statistical problems associated with multicollinearity. I first discuss selected aspects of the multicollinearity problem and describe the econometric methods used to deal with it in this study. Following this discussion, the empirical results are presented in two parts.

Multicollinearity arises when there is an approximate linear relationship among two or more explanatory variables. Coefficient estimates obtained from such data tend to be sensitive to the model specification, reflecting the multidimensional nature of the sample information. In other words, collinearity problem exists if the interpretation of the sample evidence about a coefficient depends on the uncertain prior information about the other parameters (Leamer 1978, 1976). If economic data

could be obtained from controlled experiments, then the collinearity problem could be eliminated by proper experimental design. However, this is rarely possible. Instead, it is a common practice among researchers to search over some subset of possible model specifications and to report selectively the results of this search. Often, the purpose of the search is to examine or highlight the stability of certain key "focus" variables in the study. Because the specification search and reporting of results are selective and often arbitrary, the stability of the focus variables may be overstated. And if a collinearity problem exists, it will be difficult to interpret the data evidence in a parameter-by-parameter manner.

Leamer and Leonard (1983) propose that researchers provide a thorough study of the sensitivity of posterior estimates to explicit prior beliefs concerning the importance or magnitude of so-called doubtful variables, i.e., those variables whose inclusion or exclusion from the regression model are in doubt. Prior beliefs are formally expressed in the form of a stochastic constraint $RB = r + v$, where B is a $k \times 1$ vector of regression coefficients, r is a $q \times 1$ vector which contains the researcher's prior information about the mean values of the B's, and R is a nonsingular $q \times k$ matrix which embodies prior knowledge about linear relationships among the B's. The disturbance term v is assumed to be normally distributed with mean zero and variance-covariance matrix V. The matrix V is not required to be known.

Suppose that $q < k$ variables are labeled doubtful variables in a given model. This is the same thing as saying that q prior means are zero. Given q constraints, there are 2^n possible ways of imposing them on the regression morel and therefore 2q possible constrained estimates. The set of estimates obtained by including or excluding any linear combination of the doubtful variables is found by setting R equal to the identity matrix and the prior mean vector equal to a vector of zero. This procedure

effectively mimics the ad hoc interpretive searches used when multicollinearity renders the posterior distribution highly sensitive to changes in the prior. Leamer and Leonard (1983) suggest that researchers report the extreme values of the posterior or Bayesian estimator and that the interval produced by these values be compared to the sampling uncertainty interval, where the latter is given by, say, the 95 percent confidence interval.

To apply these procedures, my reading of earlier studies lead to treatment of the following economic and regulatory variables as focus variables: price, income, tourism, monopoly control, minimum age, and number of outlets. Six additional variables are selected for treatment as doubtful variables: substitute price, youth percentage, religious affiliation, unemployment rate, type of outlet, and bans on price advertising. None of these are obviously important factors, but each has received some emphasis in one or more earlier studies.

Least Squares Estimates. Table 2 presents regression estimates obtained by ordinary least squares.[8] The first regression for each beverage includes only the six focus variables, while the second regression contains all twelve variables. The variable *PRICE* has a negative coefficient and is significant in all six regressions. The demand for beer is price inelastic, although an elasticity of -0.4 to -0.6 is not trivial. The demand for spirits is approximately unitary price elastic, while wine demand is price elastic.

[Table 2 Omitted in Printing]

The variable *INCOME* is positive and significant in five of six cases. Beer demand is income inelastic, wine is income elastic, and spirits are approximately unitary elastic. The variable *TOURISM* is positive and significant in all six regressions, with spirits having the largest

[8] The estimates were checked for heteroskedasticity using the Goldfeld-Quandt test. Since the sets of regressors are essentially identical, estimation by seemingly unrelated regressions would not produce a gain in efficiency compared to OLS.

elasticity and beer the smallest. *OUTLETS* is positive and significant for beer, but there are no significant coefficients for spirits or wine, and in the two of four cases the wrong signs appear. *CONTROL* has the expected negative sign in all six regressions, but it is never statistically significant. *AGE* has the correct positive sign in all six cases, but it is statistically significant in only one instance.

Among the doubtful variables, *RELIGION* has a negative sign and is statistically significant for spirits consumption. *STORE* has a positive coefficient, indicating that the availability of wine in grocery stores has the effect of increasing per capital consumption. None of the coefficients for the remainder of the doubtful variables are statistically significant at conventional confidence levels.

Extreme Bounds Estimates. The inferences obtained from the least squares estimates rest on only two model specifications from numerous possible alternatives. Given all possible linear combinations of the doubtful variables, extreme values of the estimates delineate the ambiguity about a coefficient induced by the choice of model specification. If the interval produced by the extreme bounds is small relative to the sampling uncertainty, then the ambiguity in the model may be considered irrelevant since all models lead to essentially the same inferences. The results for a particular variable are thus robust. But if the interval is broad, the results produced by any particular model specification are fragile and should be treated with appropriate caution.

Table 3 shows the sensitivity results produced by Bayesian search procedures developed by Leamer (1978) and described in Leamer and Leonard (1983). For each focus variable, I present the extreme lower and upper bounds produced by including all possible weighted combinations of the doubtful variable in the regressions. Following Leamer and Leonard's suggestion, this range can be compared to the sampling uncertainty interval as de-

termined by a 95 percent confidence level. In all cases, the latter interval is larger than the former interval.

[Table 3 Omitted in Printing]

These results indicate that the own-price, consumer's income, and tourism activity are robust determinants of alcoholic beverage consumption. That is, the regression coefficients for these variables are statistically significant, and the lower and upper bounds produced by the Bayesian procedures do not contain both positive and negative signs. Of the other variables, only *OUTLETS* in the beer regression meets both tests of robustness. The results for all other focus and doubtful variables are too fragile to be acceptable estimates.[9]

5. Conclusions

This paper estimates the consumption effects of state monopolies using cross-sectional alcoholic beverage demand functions for the year 1982. Separate estimates are provided for beer, distilled spirits, and wine. The regressions incorporate a number of regulatory variables including state monopoly control, number of outlets, type of outlet, minimum legal drinking age, and restrictions on price advertising. Using a mixture of classical and Bayesian econometric procedures, I show that a beverage's real own-price, consumer's real disposable income, and state tourism activity are determinants of per capita consumption. Regulation of the total number of outlets also has an effect on beer consumption. None of the other economic, regulatory, or cultural variables can be considered as statistically significant and robust determinants of alcoholic beverage consumption. In particular,

[9] In other work, I have examined the robustness of the results when individual states are deleted from the sample. Deletions are based on the Belsley-Kuh-Welsch diagnostics for influential data. In particular, deletion of DC, NH, and NV have no noticeable effect on the significance of the control dummy for distilled spirits. These results are available upon request.

there is no evidence that monopoly control has a direct effect on consumption, although indirect effects may occur through the price level. These results are generally consistent with Simon (1966), but contrast sharply with the more expansive results reported by Ornstein and Hanssens (1985) and others.

We must, therefore, look at other possible implications of state regulation to discover the intent or effect of monopoly control. One possibility is that some or all of the monopoly rents are captured by labor unions in the form of higher wages, shorter working hours, and so forth. Evidence consistent with this outcome is found in Zardkoohi and Sheer (1984). Since monopoly systems are reputed to have some advantages in purchasing wholesale liquor and wine, this may help explain why control state and license state prices do not differ on average.

Second, despite differences in form, the substance of regulation under control vs. license states may not differ significantly. Retail outlets in license states are privately owned but heavily regulated and restricted. These regulations extend to the level and structure of prices, entry into the market, advertising of product, and so on. As a result, the differences between the two types of regulation are possibly more apparent than real, and this is reflected in the regression estimates.

Third, given that transaction costs are higher in monopoly states, consumers are being taxed indirectly through inconvenient store locations, shorter hours of operation, limited brand availability, and inadequate advertising. The effect on consumption depends on whether most consumers treat these extra costs as a lump-sum tax or a per unit tax on their purchases. In the former case, the general incentive is to reduce the number of shopping trips, increase the average amount purchased per trip, and increase the average inventory held for future consumption. The beginning of purchases for off-premise con-

sumption is affected, but the level of consumption is not.[10] The results in this paper are not inconsistent with this possibility.

More generally, Noll (1989, 1255) argues that the market failure rationale for regulation has three components: first, a positive theory of conditions under which market outcomes are inefficient; second, a normative theory of government actions to improve market efficiency; and third, a positive theory of the effects of government intervention. The present study indicates that government ownership of liquor and wine distribution as a means to reduce alcohol consumption has been unsuccessful. From a governance structure standpoint (Crew and Kleindorfer 1986, 148), the choice of governance mode for alcohol sales should therefore depend on minimization of total transactions costs. While certain selling costs will be higher under private enterprise, we can be fairly certain these reflect consumer demand. The same cannot be said for monopoly.

[Data Appendix Omitted in Printing]

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[10] The consumption measures are for total consumption, which combines off- and on-premise consumption. A related effect of monopoly control will be a shift in purchases away from off-premise consumption. We can expect that bar and restaurant owners would be strong supporters of state ownership.

Supreme Court, U.S.
FILED
JUL 6 1995
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(12)

No. 94-1140

In The

Supreme Court of the United States

October Term, 1995

44 LIQUORMART, INC. and
PEOPLES SUPER LIQUOR STORES, INC.,

Petitioners,

v.

STATE OF RHODE ISLAND, and
RHODE ISLAND LIQUOR STORES ASSOCIATION,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

1. Whether Rhode Island may, consistent with the First Amendment, prohibit truthful, non-misleading price advertising regarding alcoholic beverages?

TABLE OF CONTENTS

Page

Question Presented i

Table of Authorities iv

Cases iv

Statutes and Rules vi

Miscellaneous vi

Opinions Below 1

Basis For Jurisdiction 2

Statutes Involved 2

Statement of the Case 3

Procedural History 3

Facts 5

Summary of Argument 9

Argument 11

A. Truthful, Non-misleading Price Advertising Is Protected By The First Amendment. The Court Of Appeals Erred In Upholding Rhode Island's Prohibition On Price Advertising Without Proof By The State That The Ban Directly And Materially Advances The State's Asserted Interest In Reducing Abuse Of Alcoholic Beverages 11

B. Rhode Island's Ban On Truthful, Non-misleading Price Advertising Does Not Directly Advance Its Professed Interest In Reducing Abuse Of Alcoholic Beverages To A Material Degree, Thereby Failing The Third Part Of The *Central Hudson* Test 14

TABLE OF CONTENTS – Continued

Page

C. Rhode Island's Ban On Advertising The Price At Which Retailers Sell Alcoholic Beverages Is More Extensive Than Necessary To Serve The State's Asserted Interest In Reducing Abuse of Alcoholic Beverages 22

D. Rhode Island May Not Ban Truthful, Non-Misleading Price Advertising By Out-Of-State Retailers Of Alcoholic Beverages..... 24

E. The Twenty-first Amendment Does Not Give An Added Presumption Of Validity To Rhode Island's Ban On Truthful, Non-Misleading Price Advertising Of Alcoholic Beverages.... 26

Conclusion 32

TABLE OF AUTHORITIES

Page

CASES

324 Liquor Corp. v. Duffy, 479 U.S. 335 (1987).....18, 28

44 Liquormart, Inc. v. Racine, 829 F. Supp. 543 (D.R.I. 1993)..... *passim*

44 Liquormart, Inc. v. State of Rhode Island, 39 F.3d 5 (1st Cir. 1994)..... *passim*

Bacchus Importer Ltd. v. Dias, 468 U.S. 263 (1984)..... 28

Bates v. State Bar of Arizona, 433 U.S. 350 (1977)..... 11

Bigelow v. Virginia, 421 U.S. 809 (1975)..... 26

Board of Trustees of State Univ. of New York v. Fox, 492 U.S. 469 (1989)..... 22

Brown-Forman Distillers Corporation v. New York State Liquor Authority, 476 U.S. 573 (1986)..... 28

California Retail Liquor Dealer's Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980)..... 28

California v. LaRue, 409 U.S. 109 (1972).....26, 30

Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984)..... 29

Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557 (1980)... *passim*

City of Newport, Kentucky v. Iacobucci, 479 U.S. 92 (1986)..... 27

Craig v. Boren, 429 U.S. 190 (1976).....27, 28

Dept. of Revenue v. James B. Beam Distilling Co., 377 U.S. 341 (1964)..... 28

Doran v. Salem Inn, Inc., 422 U.S. 922 (1975)..... 30

Edenfield v. Fane, ___ U.S. ___, 113 S. Ct. 1792 (1993).....11, 14, 16, 22, 24

TABLE OF AUTHORITIES – Continued

Page

Healy v. The Beer Institute, 491 U.S. 324 (1989) 28

Ibanez v. Florida Dept. of Business and Professional Regulation, ___ U.S. ___, 114 S. Ct. 2084 (1994) 12, 14, 16

Joseph E. Seagram & Sons v. Hostetter, 16 N.Y.2d 47 (1965) 19

Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982) 29

Lee v. Weisman, 505 U.S. 577, 112 S. Ct. 2649 (1992) 29

Michigan Beer & Wine Wholesalers Association v. Attorney General, 142 Mich. App. 294, 370 N.W.2d 328 (Mich. Ct. App. 1985), *cert. den.* 479 U.S. 939 (1986) 18

New York State Liquor Authority v. Bellanca, 452 U.S. 714 (1981) 30

Pennsylvania R. Co. v. Chamberlain, 288 U.S. 333 (1933) 14

Rhode Island Liquor Stores Ass'n v. Evening Call Pub. Co., 497 A.2d 331 (R.I. 1985) 5, 8

Rice v. Alcoholic Beverage Control Appeals Bd., 579 P.2d 476 (Cal. 1978) 18

Rubin v. Coors Brewing Co., ___ U.S. ___, 115 S. Ct. 1585 (1995) ..... *passim*

S & S Liquormart, Inc. v. Pastore, 497 A.2d 729 (R.I. 1985) 5

South Dakota v. Dole, 483 U.S. 203 (1987) 28

Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) .... *passim*

Wisconsin v. Constantineau, 400 U.S. 433 (1971) 28

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND RULES

28 U.S.C. § 1254 2

28 U.S.C. § 1331 3

42 U.S.C. § 1983 3

Regulation 32 of the Rhode Island Liquor Control Administration 3

Rhode Island General Laws § 3-8-7 ..... 2, 3, 6

Rhode Island General Laws § 3-8-8.1 ..... 2, 3, 6

United States Constitution, Amendment I ..... *passim*

United States Constitution, Amendment XXI, § 2 ...*passim*

MISCELLANEOUS

M. J. Waterson, ADVERTISING BRANDS AND MARKETS (Advertising Ass'n Monograph, 2nd ed. 1985) 20

New York State Moreland Commission on the Alcoholic Beverage Control Law, REPORT AND RECOMMENDATIONS NO. 3, January 21, 1964 18

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BRIEF FOR PETITIONERS

Opinions Below

1. *44 Liquormart, Inc. v. Racine,* 829 F. Supp. 543 (D.R.I. 1993).[1]

2. *44 Liquormart, Inc. v. State of Rhode Island,* 39 F.3d 5 (1st Cir. 1994).[2]

[1] The decision is reproduced in the Appendix to the petition for a writ of certiorari (App.) at 17-47.

[2] The decision is reproduced at App. 1-12.

Basis For Jurisdiction

The judgment of the United States Court of Appeals for the First Circuit was entered on October 24, 1994. This Court granted the petition for a writ of certiorari on May 1, 1995. Jurisdiction is conferred by 28 U.S.C. § 1254.

Statutes Involved

United States Constitution, Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment XXI, § 2:

> The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Rhode Island General Laws §§ 3-8-7 and 3-8-8.1 and Regulation 32 of the Rhode Island Liquor Control Administration.[3]

[3] The text of the statutes and regulation is set forth in the Statutory Addendum.

Statement of the Case

Procedural History

This is an action by 44 Liquormart, Inc., a Rhode Island liquor store operator (44 Liquormart), and Peoples Super Liquors, Inc., a Massachusetts liquor store operator (Peoples), originally brought against the Rhode Island Liquor Control Administrator (the Liquor Control Administrator), for a determination that R.I.G.L. §§ 3-8-7 and 3-8-8.1 and Regulation 32 of the Rhode Island Liquor Control Administration, which ban advertising the price of alcoholic beverages within the State of Rhode Island, deny the petitioners their constitutional right to freedom of speech and deny the citizens of Rhode Island their constitutional right to obtain accurate price information about lawful products (J.A. 28-37). Jurisdiction in the United States District Court is based upon 28 U.S.C. § 1331 (federal question) and 42 U.S.C. § 1983 (deprivation of federal constitutional rights under color of state law). The Rhode Island Liquor Stores Association (RILSA) was permitted to intervene over the plaintiffs' objection to protect its members' interest in restricting

competition (J.A. 3).[4] Later the State of Rhode Island was substituted for the Liquor Control Administrator as a party defendant (J.A. 11).

After trial on the merits, including taking testimony of expert witnesses for both sides, the District Court applied the standard set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980) to the facts found, and entered a judgment that the price advertising ban was unconstitutional. *44 Liquormart, Inc. v. Racine, supra.* The State and RILSA appealed to the United States Court of Appeals for the First Circuit (J.A. 10, 11).

On May 2, 1994, the Court of Appeals affirmed the District Court's ruling as to out-of-state retailers, but reversed as to Rhode Island retailers (J.A. 16). Both sides filed petitions for rehearing with suggestions for rehearing *en banc* (J.A. 16). On July 8, 1994, the panel ordered the May 2 opinion withdrawn and issued a "not for publication" amended opinion that reached the same result as the earlier opinion (J.A. 17). The court "ordered that either party may file a petition for rehearing with a suggestion for rehearing en banc by July 22, 1994" (J.A.

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[4] In its memorandum in support of its motion to intervene, at page 2, the Rhode Island Liquor Stores Association stated its interest: "The overwhelming majority of the Class A Retailers in the State of Rhode Island operate at a marginal profit. The elimination of the prohibition on advertising of liquor sales would, of necessity, add an additional financial burden to each of the Class A Retailers who would be obliged to participate in the advertising arena and would be at a definite disadvantage when matched up against retailers who hold multiple licenses" (J.A. 43).

17). Both sides did so. (J.A. 25-26). On July 29, 1994, the Court of Appeals denied 44 Liquormart's petition for rehearing, but took no action on those of Rhode Island and RILSA (J.A. 18). On October 24, 1994, the Court of Appeals entered a judgment reversing the decision of the District Court in its entirety. *44 Liquormart, Inc. v. State of R.I., supra.*

Facts

44 Liquormart operates a retail store for the sale of alcoholic beverages for consumption off the premises in Johnston, Rhode Island. Peoples operates retail stores for the sale of alcoholic beverages for consumption off the premises in New Bedford and Fairhaven, Massachusetts. The Liquor Control Administrator is charged with enforcing Rhode Island's laws and regulations governing the sale of alcoholic beverages. *44 Liquormart, Inc. v. Racine, supra,* 829 F. Supp. at 544 (App. 20).

Rhode Island permits all advertising relating to alcoholic beverages, except that it forbids any reference to price outside licensed retail premises and prohibits Rhode Island communications media from accepting any advertisements that contain any reference to price in other states as well as Rhode Island. *Ibid.* The Rhode Island Supreme Court has upheld the ban against First Amendment challenges by a Rhode Island retailer seeking a declaratory judgement that it could advertise prices, *S & S Liquormart, Inc. v. Pastore,* 497 A.2d 729 (R.I. 1985), and a Rhode Island newspaper that was enjoined from publishing out-of-state price advertisements. *Rhode Island Liquor Stores Ass'n v. Evening Call Pub. Co.,* 497 A.2d 331

(R.I. 1985).[5] The Liquor Control Administrator vigorously enforces the price advertising ban. The ban on price advertising has been interpreted to go beyond stating the price at which a product is offered for sale. The Liquor Control Administrator has found that the price advertising ban prohibits use of the word "sale" in alcoholic beverages advertisements and that use of the word "wow" when juxtaposed with a reference to a particular item of alcoholic beverages in an advertisement also violates the statute and regulation. On December 17, 1991, the Liquor Control Administrator found 44 Liquormart in violation of R.I.G.L. §§ 3-8-7 and 3-8-8.1 and Regulation 32. She imposed a fine for publishing advertisements containing the words "wow" and "sale" in a newspaper even though the advertisements did not state the price at which any product was offered for sale.[6]

Other liquor licensees, as well as newspapers within Rhode Island, have been warned and fined for violation of the price advertising ban. *Ibid.*

Peoples, a Massachusetts retailer, has made extensive use of price advertising in Massachusetts where it is

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[5] In both of those cases, over dissent, the Rhode Island Supreme Court relied upon the Twenty-first Amendment to shift the burden of proof to the party challenging the price advertising ban.

[6] 44 Liquormart's advertisement appears at J.A. 49. The hearing before the Liquor Control Administrator is set forth at J.A. 51-66. At the hearing the Administrator suggested that she did not think it would be permissible for "a license holder to publish ads requesting that people join a movement to change the law" (J.A. 57).

permitted. Peoples has attempted to place its advertisements, which include price information, in Rhode Island communications media, but has been refused because of the Rhode Island statute. Rhode Island communications media reach both Rhode Island and Massachusetts citizens. *Ibid.*

Both 44 Liquormart and Peoples desire to advertise the prices at which they offer alcoholic beverages for sale in Rhode Island communications media. Their proposed price advertising does not concern an illegal activity and presumably would not be false or misleading. *Ibid.*

Rhode Island justifies its ban on price advertising solely as "promoting temperance." The Attorney General explained on the record below that the State was not concerned with "responsible drinkers," but with reducing the availability of alcoholic beverages to persons of limited incomes who might abuse them (J.A. 67). The State's theory is that price advertising may stimulate "price wars" which the State believes might lower a theoretical "artificial price floor" that may result from the public's ignorance of retail prices. The State conjectures that lower prices will lead to more abusive consumption, but it was unable to prove any such connection. Its only witness could not say how much lower prices might go if the advertising ban was not in place, or even what an optimal price might be. He did not know Rhode Island's current price structure or the prices in neighboring states. *44 Liquormart, Inc. v. Racine, supra,* 829 F. Supp. at 549 (R., Saffer Tr. 43-49).

There are no scientific studies that show banning price advertising has any direct effect upon consumption.

44 *Liquormart, Inc. v. Racine, supra,* 829 F. Supp. at 546 (App. 22). In 1985 the Federal Trade Commission found that there is no reliable basis on which to conclude that any alcohol advertising significantly affects alcohol abuse, and that there is no basis for concluding that banning or otherwise limiting advertising would offer significant protection to the public. *Ibid.*

Even if the State's purpose was reducing consumption *vel non*,[7] consumption of alcoholic beverages is affected by factors such as religion, ethnic background, family makeup and peer pressure that are more important in determining the amount of alcohol consumed than the presence or absence of price advertising. Indeed, per capita consumption in Rhode Island is higher than in some states that permit price advertising. According to the latest statistics, Rhode Island ranked in the upper 30 percent of the states in total per capita consumption. *Ibid.* No evidence was presented as to where Rhode Island ranked in abusive consumption.

After hearing all the evidence, the District Court found that Rhode Island's off-premises price advertising ban has had no material impact on levels of alcohol

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[7] At various points in its decisions upholding the price advertising ban the Rhode Island Supreme Court referred to the State's temperance interest as "reducing the consumption of liquor," "alcoholic moderation or abstinence," *S & S Liquor Mart, Inc. v. Pastore, supra,* 497 A.2d at 734, reducing "excessive drinking," *Id.* at 737-738, and discouraging "tipplers from tippling more intoxicants." *Rhode Island Liquor Stores Ass'n v. Evening Call Pub. Co., supra,* 497 A.2d at 336. It seems clear that according to both the State's highest court and its Attorney General, its interest is in preventing abusive consumption.

consumption in Rhode Island. *44 Liquormart, Inc. v. Racine, supra,* 829 F. Supp. at 549 (App. 31).

Summary of Argument

Truthful, non-misleading price advertising has been specifically entitled to First Amendment protection since 1976 when the Court held that it was "indispensable" to the preservation of our free enterprise economy. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976). If truthful, non-misleading price advertising may be restricted at all, the state must prove that its restriction satisfies the four part test established by *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, supra.*

The primary focus of this case is on the last two parts of the *Central Hudson* analysis. Rhode Island is required to prove that its ban on truthful, non-misleading price advertising directly advances its asserted interest in discouraging abusive consumption of alcoholic beverages and is not a more extensive restriction on speech than necessary to serve that interest. The State's theory was that denying consumers truthful price information, would inhibit its retailers from engaging in price wars and thereby make alcoholic beverages more expensive for all consumers, discouraging abusive consumption by some consumers. The State failed the third part of the *Central Hudson* test because it could not produce any evidence that its ban on speech had any effect on abusive consumption. Indeed, the District Court found that the

ban "has no significant impact on levels of alcohol consumption in Rhode Island." 44 *Liquormart, Inc. v. Racine, supra,* 829 F. Supp. at 549 (App. 31). Furthermore, the State failed the final part of the *Central Hudson* test since it could have accomplished its purpose without restricting speech at all, by setting minimum prices or raising alcohol taxes. In the case of Rhode Island's ban on newspapers accepting truthful, non-misleading price advertisements from out-of-state retailers, the State's asserted interest disappears and its failure of proof is even more obvious.

In reversing the District Court's judgment, the Court of Appeals jettisoned the requirement that the burden of proof under *Central Hudson* rests on the State. It did not find that the State had carried the burden of proof. Instead the Court of Appeals found the evidence went "both ways," improperly shifted the burden to the petitioners and concluded that the petitioners had failed to show that Rhode Island's price advertising ban did not satisfy *Central Hudson.*

In addition to erroneously reading the allocation of the burden of proof under *Central Hudson,* the Court of Appeals gave the State the benefit of an "added presumption of validity" because of the Twenty-first Amendment. In so doing, the Court of Appeals again improperly shifted the burden of proof to the petitioners. This Court disaffirmed any implication that the Twenty-first Amendment gives the State any added weight in the *Central Hudson* analysis in *Rubin v. Coors Brewing Co.,* ___ U.S. ___, 115 S. Ct. 1585, 1589-1590, n.2 (1995). This case is a logical extension of *Rubin.* The Court should clearly

establish that the Twenty-first Amendment does not diminish the force of the First Amendment.

Argument

A. Truthful, Non-misleading Price Advertising Is Protected By The First Amendment. The Court Of Appeals Erred In Upholding Rhode Island's Prohibition On Price Advertising Without Proof By The State That The Ban Directly And Materially Advances The State's Asserted Interest In Reducing Abuse Of Alcoholic Beverages.

For almost twenty years the Court has required that governmental attempts to regulate advertising be weighed against "the right of the speaker and the audience, not the government, to assess the value of the information presented." *Edenfield v. Fane*, ___ U.S. ___, 113 S. Ct. 1792, 1798 (1993). In 1976, the Court declared that First Amendment protection for truthful, non-misleading price advertising was required because "the free flow of commercial information is *indispensable*" to the multitude of "private economic decisions" which are essential to the preservation of a "predominantly free enterprise economy." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976) [emphasis added].

The Court has never strayed from the holding that truthful, non-misleading price advertising is protected under the First Amendment. *See, e.g., Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). Nor has the Court retreated from the requirement that the government must prove

the validity of its restrictions on commercial speech. Indeed, before the final decision of the Court of Appeals below was announced, this Court reemphasized that "only commercial speech that is false, deceptive or misleading can be banned," while "[c]ommercial speech that is not false, deceptive, or misleading can be restricted, but only if the state shows that the restriction directly and materially advances a substantial state interest in a manner no more extensive than necessary to serve that interest." *Ibanez v. Florida Dept. of Business and Professional Regulation*, ___ U.S. ___, 114 S. Ct. 2084, 2088 (1994). The Court pointedly cautioned against deferring to the state's regulatory process by highlighting the state's substantial burden of justifying its restrictions on commercial speech.

> The State's burden is not slight; the "free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful." *Zauderer, supra*, 471 U.S., at 646, 105 S. Ct., at 2279. "[M]ere speculation or conjecture" will not suffice; rather the State "must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield, supra*, at ___, 113 S. Ct., at 1800; see also *Zauderer, supra*, 471 U.S., at 648-649, 105 S. Ct., at 2280-2281 (State's "unsupported assertions" insufficient to justify prohibition on attorney advertising; "broad prophylactic rules may not be so lightly justified if the protections afforded commercial speech are to retain their force"). 114 S. Ct. at 2089.

Just last term, the Court returned to *Virginia State Board of Pharmacy* in striking down a federal prohibition on truthfully stating the alcoholic content of beer on its labels. *Rubin v. Coors Brewing Co.*, ___ U.S. ___, 115 S. Ct. 1585, 1589 (1995). Sweeping aside the government's contention that restrictions on commercial speech concerning alcoholic beverages should be accorded especially deferential treatment, the Court prescribed that, just like all other categories of advertising, alcoholic beverage advertising may only be constitutionally regulated according to the four part test for determining the constitutionality of governmental restrictions on commercial speech enunciated in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, supra. Id.*

The Court of Appeals below disregarded the standard established by *Central Hudson* and steadfastly maintained by this Court's subsequent rulings on commercial speech. It reversed because it found the evidence went "both ways," the District Court was, in its view, not "free to choose" and so the legislative judgment of Rhode Island must prevail.[8] 44 *Liquor Mart, Inc. v. State of Rhode Island, supra*, 39 F.3d at 7 (App. 6). But, since Rhode Island had the burden of proof, even if the Court of Appeals believed the evidence went "both ways" the District Court correctly found that the State failed to carry its burden.

> We, therefore, have a case belonging to that class of cases where proven facts give equal

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[8] While the meaning the Court of Appeals intended to convey by saying the evidence went "both ways" is somewhat obscure, it surely cannot mean that the State had proved its case.

> support to each of two inconsistent inferences; in which event, neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other, before he is entitled to recover. *Pennsylvania R. Co. v. Chamberlain*, 288 U.S. 333, 339 (1933).

Therefore, the Court of Appeals erred by deferring to the State's asserted justification. It yielded to the State's goal to keep its citizens ignorant of truthful price information to covertly manipulate consumer choice instead of requiring the State to prove that the regulation would materially and directly advance the asserted state interest in temperance. The Court of Appeals' failure to hold the State to its burden of proof is particularly egregious in this First Amendment case because of the clarity with which this Court's recent cases have described it. *See, e.g., Ibanez v. Florida Dept. of Business and Professional Regulation, supra; Edenfield v. Fane, supra; Rubin v. Coors Brewing Co., supra.*

B. Rhode Island's Ban On Truthful, Non-misleading Price Advertising Does Not Directly Advance Its Professed Interest In Reducing Abuse Of Alcoholic Beverages To A Material Degree, Thereby Failing The Third Part Of The *Central Hudson* Test.

Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, supra, establishes a four part test for determining the constitutionality of governmental restrictions on commercial speech:

> [First] it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest. 447 U.S. at 566.

It is stipulated that advertising the price at which 44 Liquormart and Peoples sell their products relates to a lawful activity and is not false or misleading (J.A. 47). Accordingly, such information is generally protected under the first part of the *Central Hudson* test and specifically protected by *Virginia State Board of Pharmacy* and its progeny. The parties agree that Rhode Island has a substantial interest in regulating the sale of alcoholic beverages (J.A. 47), but that generalization can not support its restriction on commercial speech. Thus, the outcome of this case turns upon whether the State's asserted interest in "temperance," defined by the Attorney General in the District Court as an interest in discouraging irresponsible consumption by people of limited means (J.A. 67), produces a result at odds with *Virginia State Board of Pharmacy* when evaluated under the last two parts of the *Central Hudson* test.

Under *Central Hudson* the government must prove an "immediate connection" between the government's asserted interest and the prohibition on speech. If the connection is "tenuous" or "highly speculative" the prohibition is invalid. 447 U.S. at 569. A prohibition on commercial speech is not valid if it provides only "ineffective or remote support for the government's purpose."

447 U.S. at 564. The Court has strongly reiterated the government's burden of proof in *Edenfield v. Fane, supra, Ibanez, supra,* and, most recently, in *Rubin v. Coors Brewing Co., supra,* stressing that "this requirement was critical." 115 S. Ct. at 1592.

The essence of the Court of Appeals' reason for permitting Rhode Island to stifle "the free flow of commercial information," to all its citizens, temperate and intemperate, and the essence of its misapprehension of the decisions of this Court, is in its holding that the District Court could not find the statute unconstitutional "in the absence of any affirmative contradiction [to the State's hypothesis] to rely on." *44 Liquormart, Inc. v. State of Rhode Island, supra,* 39 F.3d at 8 (App. 7-8). Consequently, the Court of Appeals only required the State to articulate a theory which the petitioners were made to refute. Not only did the State fail to carry its burden *to prove* that the restriction promoted its interest in preventing abusive consumption *"to a material degree," Edenfield v. Fane, supra,* 113 S. Ct. at 1803, quoted in *Ibanez, supra,* 114 S. Ct. at 2089 [emphasis added], the petitioners' evidence convinced the District Court in its role as fact finder, that "Rhode Island's off-premises liquor price advertising ban has no significant impact on levels of alcohol consumption in Rhode Island." *44 Liquormart, Inc. v. Racine, supra,* at 549, (App. 31).

The Court of Appeals acknowledged that there is no record evidence to support the conclusion that Rhode Island's price advertising ban has materially advanced its asserted goal. *44 Liquormart v. Rhode Island, supra,* 39 F.3rd at 7 (App. 6). Moreover, the hypothesis that the price advertising ban might have such an effect is refuted by

the fact that Rhode Island was in the top 30 percent of states in per capita consumption with the ban in place. 44 *Liquormart, Inc. v. Racine, supra,* at 546 (App. 23). The State presented no evidence of where Rhode Island might stand in abusive drinking. Both the State and RILSA respond to Rhode Island's high ranking in per capita consumption by lamely questioning "where Rhode Island would be *without* the advertising ban." Rhode Island's Brief In Opposition To Petition For Certiorari, 19; RILSA's Brief In Opposition To Petition For Certiorari, 18. Significantly, they posed the question without answering it, thereby displaying the State's failure of proof.[9]

The Court of Appeals disregarded the district judge's finding of fact that the price advertising ban has had no significant impact on levels of alcohol consumption in Rhode Island because it thought the State's position had "inherent merit." *44 Liquor Mart, Inc. v. State of Rhode Island, supra,* 39 F.3rd at 7 (App. 7). It thereby relieved the State of its constitutional burden with no more than a hypothesis that does not fit the facts. Rhode Island's standing in per capita alcohol consumption shows that whatever merit there might be in the theory was not manifested in practice.[10] The hypothesis embraced by the

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[9] RILSA posited: "For all we know, without the ban Rhode Island might rank #1." Thus RILSA offers only rank speculation as a substitute for the obligation to prove that the restriction promoted the State's asserted interest in temperance "to a material degree." Rhode Island would not even speculate, it accused the petitioners of begging the question, as if the burden of proof was on the petitioners instead of the State.

[10] The petitioners are in complete agreement with the position of Amicus Curiae Washington Legal Foundation that

Court of Appeals in lieu of the proof required by *Central Hudson* is also disproved by the findings of governmental agencies that have looked at the relationship between price or advertising and consumption. For example, in 1985, the Federal Trade Commission found "no evidence to believe alcohol advertising significantly affects alcohol abuse." *44 Liquormart v. Racine, supra,* 829 F. Supp. at 546 (App. 24).[11] Not only did the State not have evidence of

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banning or restricting truthful, non-misleading commercial speech as an indirect means of regulating consumer behavior is incompatible with the First Amendment. Accordingly, for the reasons discussed in that brief, the petitioners believe Rhode Island's price advertising ban violates the second prong of the *Central Hudson* test.

[11] In 1964, the Moreland Commission was appointed by the governor of New York to study that State's minimum price requirement for liquor. The Commission flatly concluded that "[t]he argument that high prices promote temperance in that they keep liquor out of the hands of those who should not have it is unfounded." New York State Moreland Commission on the Alcoholic Beverage Control Law, REPORT AND RECOMMENDATIONS No.3, 17, January 21, 1964. The Commission compared states in which prices were high with states in which prices were low. Annual arrests for drunkenness, drunk driving, rates of alcoholism, and rates of alcohol-related first mental hospital admissions were examined to find no relationship between consumption patterns in the "low" and "high" price states. *Id.* at 18-19. The Commission concluded "artificially high prices for liquor have no substantial relationship to temperance. They serve merely to insure the profit margins of the various segments of the industry." *Id.* at 19. The Moreland Commission Report has been noticed by several courts in ruling on alcoholic beverages related issues. *324 Liquor Corp. v. Duffy,* 479 U.S. 335, 348, 351 fn.13 (1987), *Michigan Beer & Wine Wholesalers Association v. Attorney General,* 142 Mich. App. 294, 370 N.W.2d 328, 336 (Mich. Ct. App. 1985), *cert. den.* 479 U.S. 939 (1986); *Rice v.*

any material effect on consumption, the petitioners' experts showed that, because there are many intervening variables between price advertising and consumption, such as differences in drinking attitudes and customs, which are the most important determinants of drinking behavior, a direct causal connection cannot be made. *44 Liquormart, Inc. v. Racine, supra*, 829 F. Supp. at 547 (App. 27). Since the State failed to prove that its ban on truthful, non-misleading price advertising had any effect on abusive drinking, the ban does not pass the *Central Hudson* test.

In asserting that "advertising must be generally productive or so much money would not be spent on it" *44 Liquormart v. Rhode Island, supra*, 39 F.3d at 7 (App. 7), the Court of Appeals did not consider two salient facts: expenditures on alcoholic beverage advertising have been steadily increasing, while consumption has been steadily decreasing; and Rhode Island, with its price advertising ban in place for many years, is in the top 30 percent of states in per capita consumption, ahead of some states that do not ban price advertising. *44 Liquormart v. Racine, supra*, 829 F. Supp. at 546 (App. 23). Furthermore, any presumed effect of advertising in general on consumption is not relevant to the effect of a price ban, because Rhode Island permits all other forms of advertising. Thus, the State does not seek to reduce whatever effect advertising in general might have on consumption.

The fallacious assumption that advertisers would not spend money on advertising unless it generated increased consumption underlies several of the few cases

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Alcoholic Beverage Control Appeals Bd., 21 Cal. 3d 431, 457 (1978); *Joseph E. Seagram & Sons v. Hostetter*, 16 N.Y.2d 47, 209 N.E.2d 701 (1965).

upholding advertising bans. Those courts did not appreciate the fact that advertising influences a person who has already decided to buy an alcoholic beverage in choosing which brand to buy. In a "mature market," such as the market for alcoholic beverages, the purpose and effect of a particular company's advertising is to encourage consumers to choose that brand, or in the case of price advertising, which store to buy it in, not to increase general consumption of the generic product. M. J. Waterson, ADVERTISING BRANDS AND MARKETS, 19 (Advertising Ass'n Monograph, 2nd ed. 1985). If advertising takes a customer away from a competitor's product it is money well spent, although it does not increase overall consumption by so much as one bottle. Retailers like the petitioners want to advertise their prices to increase their share of the market of those who have already decided to consume, but not selected where they will acquire the product. 44 *Liquormart v. Racine, supra,* 829 F. Supp. at 549 (App. 30).

Beyond the fact that the State could not prove a substantial relationship between its price advertising ban and its asserted goal of preventing alcohol abuse, the price advertising ban is, at best, only theoretically, indirectly, related to its goal, another reason why it does not satisfy the third part of the *Central Hudson* test. As the Court noted in *Central Hudson,* "in recent years this Court has not approved a blanket ban on commercial speech *unless the expression itself was flawed in some way, either because it was deceptive or related to unlawful activity*" 447 U.S. at 566, n.9 [emphasis added].

In this case, the State's argument manifests the indirect nature of the price advertising ban's purported effect

on abusive consumption. Rhode Island does not argue, and certainly has not proven, that truthful, non-misleading price advertising stimulates consumption. Price advertising inherently only informs the public of the price at which the advertiser is offering a particular alcoholic beverages item for sale. This Court has identified truthful, non-misleading price advertising as a form of speech protected by the First Amendment because it is "indispensable" to the proper functioning of our free enterprise system. *Rubin v. Coors Brewing Co., supra,* 115 S. Ct. at 1589, quoting *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., supra.*

Under the State's attenuated reasoning, price advertising may stimulate "price wars" which the State believes might lower a theoretical "artificial price floor" that may result from the public's ignorance of retail prices. In fact, Rhode Island's regulation is not aimed at alcohol abuse at all. It is aimed at eliminating a retailer's need to protect its market share by meeting a competitor's lower prices.[12] That process is the essence of the "numerous private decisions that drive the [free enterprise] system." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., supra.* It is manifestly in the public interest that our economic system function in precisely that way. Therefore, it is highly unlikely that the Rhode Island legislature would have the political will to mount a frontal assault on the free enterprise system by

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[12] Accordingly, Rhode Island must admit that an objective of its price advertising ban is to reduce competition among retailers, a goal that has never been found to justify banning truthful, non-misleading price advertising.

fixing minimum prices. Instead, Rhode Island has covertly resorted to an unproven,[13] indirect method of price control, with no demonstrable effect on consumption (but a clear effect on the profit margin of RILSA members), that violates the protection accorded truthful, non-misleading price advertising by the First Amendment, announced by this Court in *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., supra.*

C. Rhode Island's Ban On Advertising The Price At Which Retailers Sell Alcoholic Beverages Is More Extensive Than Necessary To Serve The State's Asserted Interest In Reducing Abuse Of Alcoholic Beverages.

The final part of the *Central Hudson* test requires the State to demonstrate that its restriction on commercial speech is "not more extensive than is necessary to serve" the State's asserted interest. 447 U.S. at 566; *Edenfield v. Fane, supra.; Ibanez, supra; Rubin v. Coors Brewing Co., supra.* The test is articulated as requiring the proponent of a restriction on commercial speech to prove a reasonable " 'fit' between the legislature's ends and the means chosen to accomplish those ends." *Board of Trustees of State Univ. of New York v. Fox,* 492 U.S. 469, 480 (1989). Although the opinion in *Fox* was clear that the "reasonable fit" test was *"far different,* of course, from the 'rational basis' test,"*Id.* [emphasis added], the Court has been

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[13] The State's expert was not familiar with consumption figures for Rhode Island (R. Saffer Tr. 43), did not know what effect the price advertising ban had on Rhode Island prices (R. Saffer Tr. 45-46), and was unaware if there was a price differential between Rhode Island and Massachusetts (R. Saffer Tr. 49).

required to reiterate that a rational basis test, as advanced by the State, *44 Liquormart v. Racine*, 829 F. Supp. at 553-554 (App. 43), and adopted by the Court of Appeals below, is *not* to be applied when deciding the constitutionality of restrictions on commercial speech.[14]

> [W]hile we have rejected the "least-restrictive-means" test for judging restrictions on commercial speech, so too have *we rejected mere rational basis review*. A regulation need not be "absolutely the least severe that will achieve the desired end," *Fox, supra*, 492 U.S., at 480, 109 S. Ct., at 3035, but if there are numerous and obvious less-burdensome alternatives to the restriction on commercial speech, that is certainly a relevant consideration in determining whether the "fit" between ends and means is reasonable. *City of Cincinnati v. Discovery Network, Inc., supra*, 113 S. Ct. 1510, fn.13 [emphasis added].

Thus, as made clear in *Discovery Network*, and recently reiterated in *Rubin v. Coors Brewing Co., supra*, the availability of obvious alternatives to restricting commercial speech demonstrates that the state has not met its burden under the fourth part of the *Central Hudson* analysis. As was conceded by the State's expert, creating an artificial price floor is a result Rhode Island could directly accomplish without banning constitutionally protected speech by mandating minimum consumer prices or increasing its tax on alcoholic beverages. *44 Liquormart v.*

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[14] The Appeals Court echoed the rational basis test when it held that the State need not prove the "correctness" of its position, only its "reasonableness." *44 Liquormart v. State of Rhode Island*, 39 F.3d at 7 (App. 6).

Racine, supra, 829 F. Supp. at 549 (App. 30). Since the State could fully accomplish its asserted goal without restricting protected speech at all, *i.e.*, in a manner obviously less-burdensome to free expression, it is self-evident that its ban on price advertising is more extensive than is necessary.

The Court of Appeals' decision characterizes covert manipulation of the free enterprise system as a "reasonable choice" when Rhode Island could fully accomplish its true objective of maintaining an artificial price floor for alcoholic beverages without any restriction on speech at all. However, this Court demands that a state seeking to prohibit the conveying of information do so only in furtherance of a substantial goal, only after the cost has been "carefully calculated" and only after the state meets its burden to "*affirmatively establish* the reasonable fit" between its means and its goal. *Edenfield v. Fane, supra; Rubin v. Coors Brewing Co., supra.* The State has not done so in this case.

D. Rhode Island May Not Ban Truthful, Non-Misleading Price Advertising By Out-Of-State Retailers Of Alcoholic Beverages.

In the case of its prohibition against newspapers and other communications media accepting out-of-state price advertisements, Rhode Island bans constitutionally-protected speech that not only occurs off licensed premises, but concerns the sale of products outside its jurisdiction. Contrary to the decision of the Court of Appeals, *44 Liquor Mart, Inc. v. State of Rhode Island, supra*, 39 F.3d at 9 (App. 10-12), this Court has flatly held that a state may

not justify its out-of-state advertising ban on the alleged ground that it is attempting to protect its citizens from exposure to truthful information about legal products or services in another state.

> A State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State. It may seek to disseminate information so as to enable its citizens to make better informed decisions when they leave but *it may not, under the guise of exercising internal police powers, bar a citizen of another State from disseminating information about an activity that is legal in that State. Bigelow v. Virginia*, 421 U.S. 809, 824-825 (1975) [emphasis added].

The Court of Appeals attempted to justify Rhode Island's ban on price advertising by out-of-state retailers with the *non sequitur* "if a party wishes to come into a state and do business, to some extent at least, it should be subject to the same regulations as are its local counterparts." 44 *Liquormart, Inc. v. State of Rhode Island, supra*, 39 F.3d at 9 (App. 10-11). In the context of speech regulation, however, this aphorism not only sanctions "economic protectionism" as a legitimate reason for banning out-of-state price information, but also fails the *Central Hudson* test.

Despite the suggestion of the Court of Appeals that the petitioners relied upon the Commerce Clause, 44 *Liquormart, Inc. v. State of Rhode Island, supra*, 39 F.3d at 9 (App. 10-12), the Court of Appeals misperceived our argument, which was and is squarely based upon the First Amendment. Under *Central Hudson*, a state must

justify regulating commercial speech by proving how its regulation will alleviate real harms in that state to a material degree.

Although the Court of Appeals made an issue of finding petitioners' claims under the Commerce Clause waived, it missed the point that *Bigelow v. Virginia, supra,* determined that a state's interest in "shielding its citizens from information about activities outside [its] borders" is ordinarily "entitled to little, if any, weight" in deciding whether an out-of-state advertisement is to be divested of its First Amendment protection. 421 U.S. at 828. Because Rhode Island's only plausible objective in regulating out-of-state price advertising is illegitimate, its ban on truthful, non-misleading price advertising is forbidden by the First Amendment.

E. The Twenty-first Amendment Does Not Give An Added Presumption Of Validity To A Ban On Truthful, Non-Misleading Price Advertising Of Alcoholic Beverages.

The Court of Appeals thought it "precisely in order" to give Rhode Island's ban on truthful, non-misleading price advertising an "added presumption of validity" because of the Twenty-first Amendment, based upon the Court's use of that phrase in *California v. LaRue,* 409 U.S. 109, 118-119 (1972). 44 *Liquormart, Inc. v. State of Rhode Island, supra,* 39 F.3d at 8 (App. 8). The effect of the "added presumption" was to eliminate the State's burden under *Central Hudson* to prove the validity of its price advertising ban, and to put a requirement on the petitioners of overcoming the presumption by proving the

ban invalid. The "added presumption" rationale for disregarding the requirements of the *Central Hudson* test was expressly rejected by the Court in *Rubin v. Coors Brewing Co., supra,* 115 S. Ct. at 1590, n.2, on the ground that "*LaRue* did not involve commercial speech about alcohol, but instead concerned the regulation of nude dancing in places where alcohol was served."[15] This case should be the occasion where the Court makes it plain that the Twenty-first Amendment repealed only the Eighteenth Amendment and no part of the First Amendment.

The Twenty-first Amendment was intended to create an exception to the normal operation of the Commerce Clause by permitting states to impose burdens on interstate commerce that otherwise would be invalid.[16] "Neither the text nor the history of the Twenty-first Amendment suggests that it qualifies individual rights protected by the Bill of Rights and the Fourteenth Amendment where the sale or use of liquor is concerned." *Craig v. Boren,* 429 U.S. 190, 205-206 (1976). The

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[15] Thus Justice Stevens' apprehension that *LaRue* would become authority for the proposition that "the Twenty-first Amendment repealed not only the Eighteenth Amendment, but some undefined portion of the First Amendment as well," *City of Newport, Kentucky v. Iacobucci,* 479 U.S. 92, 103 (1986) [dissenting opinion], has been, at last, allayed.

[16] The Brief of Amici Curiae, The Beer Institute, the Distilled Spirits Council of the United States and the Wine Institute In Support of Petitioners reviews the language and legislative history of the Twenty-first Amendment and its relationship to state exercise of police power over alcoholic beverages. The Amici conclude that the Twenty-first Amendment provides no support for any diminution of the protection accorded commercial speech by the First Amendment.

Court has consistently rejected states' attempts to rely upon the Twenty-first Amendment as a justification for abrogating other constitutional provisions. *See, Dept. of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341 (1964) [states may not tax alcoholic beverages in violation of the Import-Export Clause]; *Wisconsin v. Constantineau*, 400 U.S. 433, 436 (1971) [a statute that required the posting of names of excessive drinkers in retail liquor outlets violated due process]; *Craig v. Boren, supra* [a statute that prohibited the sale of beer to men under twenty-one and women under eighteen violated equal protection]; *South Dakota v. Dole*, 483 U.S. 203 (1987) [federal statute conditioning receipt of highway funds on adoption of minimum drinking age is a valid exercise of Congress' spending power].

Significantly, the Court has found many circumstances under which the Twenty-first Amendment does not supplant even its core concern, the Commerce Clause. *California Retail Liquor Dealer's Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) [the states' power to regulate alcoholic beverages traffic is subject to federal anti-trust laws]; *Bacchus Imports, Ltd. v. Dias, supra*, ["economic protectionism" of local alcoholic beverages violates the Commerce Clause]; *Brown-Forman Distillers Corporation v. New York State Liquor Authority*, 476 U.S. 573 (1986) [state regulation of alcoholic beverages prices is invalid under the Commerce Clause when it affects prices in other states]; *324 Liquor Corp. v. Duffy*, 479 U.S. 335 (1987) [a mandatory 112 percent minimum markup on alcoholic beverages based on the wholesale price violates antitrust laws]; *Healy v. The Beer Institute*, 491 U.S. 324 (1989) [state regulation of alcoholic beverages prices is invalid under

the Commerce Clause when it affects prices in other states].

In *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 715 (1984), the Court ruled that notwithstanding the Twenty-first Amendment, the states' power to regulate alcoholic beverages advertising could be preempted solely by a federal statute passed under the Commerce Clause. The Court did not give state law any added presumption of validity because of the Twenty-first Amendment.

The Court did not have to decide whether the Twenty-first Amendment had any effect on First Amendment rights in *Crisp*. However, in *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982), the Court decided that the First Amendment prevented a state from giving churches a veto over the issuance of liquor licenses within 500 feet of them. No added presumption of constitutionality was accorded the state because of the Twenty-first Amendment. "The State may not exercise its power under the 21st Amendment in a way which impinges upon the Establishment Clause of the First Amendment." 459 U.S. at 122 n.5.

There is no principled basis to afford greater protection to the interests safeguarded by the Establishment Clause than the Free Speech Clause.[17] Thus, the Court of Appeals' use of an "added presumption" of constitutionality to shift the burden to the petitioners to prove the

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[17] This is not to say that the Free Speech Clause and the Establishment Clause operate in an identical fashion. *See, Lee v. Weisman*, 505 U.S. 577, 112 S. Ct. 2649, 2647 (1992), however, the Court has not recognized a hierarchy in the clauses whereby one is entitled to more weight than the other.

invalidity of the price advertising ban under the First Amendment cannot be reconciled with the fact that no such exception appears in the application of other constitutional provisions, including the Commerce Clause and the Establishment Clause of the First Amendment, to the regulation of alcoholic beverages.

California v. LaRue and the later cases of *Doran v. Salem Inn, Inc.*, 422 U.S. 922, (1975) and *New York State Liquor Authority v. Bellanca*, 452 U.S. 714 (1981), should remain limited to their peculiar circumstances. In those cases, the Court upheld under the Twenty-first Amendment the states' power to ban nude dancing *on licensed premises* because it was upholding a licensing provision rather than a regulation of communication. *Rubin v. Coors Brewing Co., supra.*

> In *LaRue* . . . we concluded that the broad powers of the States to regulate the sale of liquor, conferred by the Twenty-first Amendment, outweighed any First Amendment interest in nude dancing and that a State could therefore ban such dancing as a part of its liquor license program. *Doran v. Salem Inn, Inc., supra*, 422 U.S. at 932-933.

While certain nude dancing may have some communicative aspect, the nude dancing in *LaRue* had a proven risk of provoking or facilitating illegal activity on the licensed premises. The Court's opinion graphically described "numerous incidents of legitimate concern:"

> Customers were found engaging in oral copulation with women entertainers; customers engaged in public masturbation; and customers placed rolled currency either directly into the

> vagina of a female entertainer, or on the bar in order that she might pick it up herself. Numerous other forms of contact between the mouths of male customers and the vaginal areas of female performers were reported to have occurred. Prostitution occurred in and around such licensed premises, and involved some of the female dancers. Indecent exposure to young girls, attempted rape, rape itself, and assaults on police officers took place on or immediately adjacent to such premises. 409 U.S. at 111.

This Court has never held that the Twenty-first Amendment would justify a state ban on pure speech. To the contrary, the Court minimized the communicative aspect of the performances by describing them as "gross sexuality." 409 U.S. at 118. Plainly, the Court was concerned with the conduct rather than communication in *LaRue*.

> [A]s the mode of expression moves from the printed page to the commission of public acts that may themselves violate valid penal statutes, the scope of permissible state regulations significantly increases. States may sometimes proscribe expression that is directed to the accomplishment of an end that the State has declared to be illegal when such expression consists, in part, of "conduct" or "action." 409 U.S. at 117.

In contrast here, Rhode Island is attempting to ban speech that occurs off the licensed premises, which is entitled to First Amendment protection under the *Central*

Hudson test.[18] The Twenty-first Amendment does not alter the equation. The states' power to regulate commercial speech is subject to "the same First Amendment Restrictions that apply to the Federal Government," not less. *Rubin v. Coors Brewing Co., supra,* 115 S. Ct. at 1591.

Conclusion

For the foregoing reasons, the petitioners respectfully submit that the judgment of the Court of Appeals should be reversed.

By their attorney,

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[18] In the case of Peoples' advertisements, it is truthful, non-misleading speech about activity in another state and therefore plainly beyond the scope of the Twenty-first Amendment.

Statutory Addendum

R.I.G.L. § 3-8-7 controls price advertising by licensees.

> No manufacturer, wholesaler, or shipper from without this state and *no holder of a license issued under the provisions of this title and chapter shall cause or permit the advertising in any manner whatsoever of the price of any malt beverage, cordials, wine or distilled liquor offered for sale in this state;* provided, however, that the provisions of this section shall not apply to price signs or tags attached to or placed on merchandise for sale within the licensed premises in accordance with rules and regulations of the department [emphasis added].

R.I.G.L. § 3-8-8.1 controls the acceptance of price advertising by the communications media.

> *No newspaper, periodical, radio or television broadcaster or broadcasting company or any other person, firm or corporation with a principal place of business in the state of Rhode Island which is engaged in the business of advertising or selling advertising time or space shall accept, publish, or broadcast any advertisement in this state of the price or make reference to the price of any alcoholic beverages.* Any person who shall violate any of the provisions of this section shall be guilty of a misdemeanor and shall be punished for the first offense by a fine in the sum of fifty dollars ($50.00) and for each additional offense thereafter by a fine not exceeding the sum of one hundred dollars ($100). Publication or broadcast by any person in violation of the provisions of this section shall also be subject to injunctive proceedings in a court of competent jurisdiction on a complaint

> brought by a retail licensee, or an association of retail licensees.
>
> The provisions of this section shall not apply to any trade journal which is duly recognized and authorized to be exempt from the provisions of this section by the liquor control administrator [emphasis added].

R.I.G.L. § 3-8-8 is the statutory basis for the authority of the liquor control administrator to promulgate regulations.

> The liquor control administrator is hereby authorized to promulgate rules which will enforce the provisions of § 3-8-7 and he shall have the power to suspend the license of any license-holder in violation thereof.

Regulation 32 of the Liquor Control Administrator was enacted to "enforce" the provisions of § 3-8-7.

> No placard or sign of any kind which is visible from the exterior of any Class A premises licensed to sell at retail shall make reference to the price of any alcoholic beverage or mixture of alcoholic beverages.

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(16)

No. 94-1140

Supreme Court, U.S.
FILED
AUG 21 1995
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In The

Supreme Court of the United States

October Term, 1995

44 LIQUORMART, INC. and PEOPLES SUPER LIQUOR STORES, INC.,

Petitioners,

v.

STATE OF RHODE ISLAND and RHODE ISLAND LIQUOR STORES ASSOCIATION,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit

BRIEF OF RESPONDENT RHODE ISLAND LIQUOR STORES ASSOCIATION

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TABLE OF CONTENTS

Page

Table of Authorities ii

Statement of the Case 1

Summary of Argument 5

Argument 6

I. The Twenty-first Amendment vests broad authority in the individual states to regulate alcoholic beverages 6

II. The *Central Hudson* test was properly applied by the Court of Appeals for the First Circuit 16

A. The statutes under review directly advance the state's interest in promoting temperance 17

B. The statutes under review are no more extensive than necessary to serve the state's interest in promoting temperance 25

III. Rhode Island's ban on alcohol price advertising is constitutionally applicable to out-of-state retailers 28

IV. A finding that Rhode Island's statutes are unconstitutional will have reverberating results for federal, state, and local governments 30

Conclusion 34

TABLE OF AUTHORITIES

Page

CASES

44 Liquor Mart, Inc. v. Racine, 829 F.Supp. 543 (D.R.I. 1993), *rev'd sub nom. 44 Liquormart Inc. v. Rhode Island*, 39 F.3d 5 (1st Cir. 1994) 21, 24, 27

44 Liquormart, Inc. v. State of Rhode Island, 39 F.3d 5 (1st Cir. 1994) ..... *passim*

324 Liquor Corp. v. Duffy, 479 U.S. 335 (1987) 9, 27

Anheuser-Busch v. Mayor and City Council, 855 F.Supp. 811 (D.Md. 1994) 33

Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984) 9

Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991) 20

Bigelow v. Virginia, 421 U.S. 809 (1975) 28, 29

Board of Trustees of State Univ. of New York v. Fox, 492 U.S. 469 (1989) 12, 19, 24, 25, 26

Brown-Forman Distillers Corporation v. New York State Liquor Authority, 476 U.S. 573 (1986) 9

Burson v. Freeman, 504 U.S. 191 (1992) 20

Cal-Almond, Inc. v. U.S. Department of Agriculture, 14 F.3d 429 (9th Cir. 1993) 13

California v. LaRue, 409 U.S. 109 (1972) 13, 14, 15

California Retail Liquor Dealer's Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980) 9, 27

Capital Broadcasting Co. v. Acting Attorney General, 405 U.S. 1000 (1972) 32

TABLE OF AUTHORITIES – Continued

Page

Capital Broadcasting Company v. Mitchell, 333 F.Supp. 582 (D.D.C. 1971) summarily aff'd *sub nom. Capital Broadcasting Co. v. Acting Attorney General*, 405 U.S. 1000 (1972) 32

Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984) 7, 15, 16, 27

Central Hudson Gas and Electric Corp. v. Public Service Comm'n of New York, 447 U.S. 557 (1980).. *passim*

City of Cincinnati v. Discovery Network, Inc., 507 U.S. ___, 113 S.Ct. 1505 (1993) 27

City of Newport, Ky. v. Iacobucci, 479 U.S. 92 (1986) 14

City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) 20

Craig v. Boren, 429 U.S. 190 (1976) 9

Dept. of Revenue v. James B. Beam Distilling Co., 377 U.S. 341 (1964) 9

Edenfield v. Fane, 507 U.S. ___, 113 S.Ct. 1792 (1993) 18, 20, 31

Florida Bar v. Went For It, Inc., ___ U.S. ___, 115 S.Ct. 2371 (1995) 16, 20, 25

Healy v. The Beer Institute, 491 U.S. 324 (1989) 9

Ibanez v. Florida Dept. of Business and Professional Regulation, ___ U.S. ___, 114 S.Ct. 2084 (1994) 31

Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982) ...9, 13

New York State Liquor Authority v. Bellanca, 452 U.S. 714 (1981) 14

Pennsylvania R. Co. v. Chamberlain, 228 U.S. 333 (1933) 24

TABLE OF AUTHORITIES – Continued

Page

Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico, 478 U.S. 328 (1986) ..... *passim*

Princess Sea Industries v. State, Clark County, 635 P.2d 281 (Nev. 1981) 32

Queensgate Investment Co. v. Liquor Control Commission, 69 Ohio St.2d 361, 433 N.E.2d 138 (1982), *appeal dismissed for want of a substantial federal question*, 459 U.S. 807 (1982) 12

Rubin v. Coors Brewing Co., 514 U.S. ___, 115 S.Ct. 1585 (1995) 8, 9, 14, 15, 16, 17, 27

South Dakota v. Dole, 483 U.S. 203 (1987) 9

United States v. Edge Broadcasting Company, 509 U.S. ___, 113 S.Ct. 2696 (1993) ..... *passim*

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) ... 15, 20, 30

Wisconsin v. Constantineau, 400 U.S. 433 (1971) 9

STATUTES AND RULES

15 U.S.C. § 1335 31

42 U.S.C. § 1983 4

Rhode Island General Laws § 3-8-7 1

Rhode Island General Laws § 3-8-8.1 ..... 2, 28

Nevada Revised Statutes § 201.430 32

Nevada Revised Statutes § 201.440 32

Nevada Revised Statutes § 244.345 32

TABLE OF AUTHORITIES – Continued

Page

Federal Rule of Evidence 803(8) 22

Federal Rule of Evidence 803(18) 22

OTHER AUTHORITIES

Nicotine Attack, Cigarette Regulation Is Formally Proposed; Industry Sues to Halt It, WALL ST. J., Aug. 11, 1995, at A1 (1995) 33

Steve Younger, *Alcoholic Beverage Advertising on the Airwaves: Alternatives to a Ban or Counteradvertising*, 34 UCLA L. REV. 1139 (1987) 32

STATEMENT OF THE CASE

Petitioners 44 Liquormart, Inc. and Peoples Super Liquor Stores, Inc. (Liquormart, Peoples, petitioners) have been granted this Court's writ of *certiorari* to the United States Court of Appeals for the First Circuit. They ask that the decision in *44 Liquormart, Inc. v. State of Rhode Island*, 39 F.3d 5 (1st Cir. 1994), be reversed. The Court limited its review to the question: "Whether Rhode Island may, consistent with the First Amendment, prohibit truthful, non-misleading price advertising regarding alcoholic beverages?" Relying primarily on the four-prong balancing test set forth in *Central Hudson Gas and Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557 (1980), petitioners assert that two Rhode Island statutes violate their First Amendment right to free commercial speech. Respondent Rhode Island Liquor Stores Association (RILSA), on the other hand, maintains that the court of appeals correctly held that there was no violation of petitioners' constitutional rights particularly when the Twenty-first Amendment to the United States Constitution is added to the balance.

After a hearing on December 17, 1991, the Rhode Island liquor control administrator found that Liquormart had violated the provisions of R.I. Gen. Laws § 3-8-7. Appendix (A.)[1] 48. She imposed a $400 fine which Liquormart paid; Liquormart did not take an administrative appeal. A. 20-21.

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[1] Citations to the appendix "A." refer to the appendix to the petition for a writ of *certiorari*.

Peoples owns several liquor stores in Massachusetts. It was interested in advertising liquor prices in Rhode Island media outlets to attract Rhode Island purchasers to its Massachusetts stores but was prevented from doing so by the provisions of R.I. Gen. Laws § 3-8-8.1. A. 49.

On February 28, 1992, Liquormart and Peoples filed this action against the Rhode Island liquor control administrator.[2] RILSA's motion to intervene as a defendant was granted. The trial was conducted on March 11, 1993. The parties stipulated to a number of facts, including that "[t]he proposed speech does not concern an illegal activity and presumably would not be false or misleading" and that "[t]he State of Rhode Island has a substantial interest in regulating the sale of alcoholic beverages." J.A.[3] 47. The record of the trial consists of the transcript of the deposition testimony of one expert and the presentations of the parties, augmented by the depositions of two additional experts. *Id.*

In his Memorandum and Order, first noting the "pronounced lack of unanimity among researchers who have studied the effects of alcohol advertising," A. 22, the district court judge reviewed the testimony presented. He observed that the experts presented by the plaintiffs "maintained * * * that there is no empirical evidence that the presence or absence of alcohol price advertising significantly affects levels of alcohol consumption." A. 23.

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[2] The State of Rhode Island was subsequently substituted in lieu of the liquor control administrator.

[3] Citations to the appendix "J.A." refer to the joint appendix to the briefs on the merits.

The judge required the state to bear the burden of justifying the alcohol price advertising ban. He rejected the argument that the Twenty-first Amendment adds a presumption of validity to the state statutes and, thus, shifts the burden of proof to the party challenging its constitutionality. A. 42-43. The court held: "I find as a fact that Rhode Island's off-premises liquor price advertising ban has no significant impact on levels of alcohol consumption in Rhode Island." A. 31. Based on that factual conclusion, the judge found that the statutes are unconstitutional because they impermissibly restrict commercial speech. A. 47.

RILSA and Rhode Island each appealed that decision to the court of appeals. The appeal was argued on February 10, 1994. On May 2, 1994, the court issued the first of its three opinions. J.A. 16, 24. The trial court's decision was reversed in part and sustained in part: the statutes were held to be constitutional insofar as Rhode Island merchants are affected but unconstitutional as applied to Massachusetts merchants. In reaching its decision the court applied the *Central Hudson* test:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Central Hudson, 447 U.S. at 566.

All parties petitioned for a rehearing and suggested a rehearing en banc. J.A. 16, 24. Those petitions were denied on July 8, 1994. On that same date, the court's May 2 judgment was vacated, the opinion withdrawn, and a second opinion was substituted.[4] J.A. 16-17, 24-25. The result reached in the second opinion was the same as that of the first decision although the reasoning regarding Massachusetts merchants differed. The court specifically provided that the parties could file petitions for rehearings with suggestions for rehearing en banc by July 22, 1994. All parties took advantage of that opportunity. J.A. 17-18, 25-26.

Liquormart and Peoples' petition was denied on July 29, 1994. A. 16. On October 24, the petitions filed by RILSA and the state were granted, the July 8 opinion was withdrawn, and the judgment of that date was vacated. A. 15. In its place a third opinion was issued and judgment was entered for RILSA and the state. On reconsideration, the court found that petitioners had waived the issue of the relationship between the Commerce Clause and the Twenty-first Amendment by failing to brief it on appeal. A. 11-12. Thus, the court held that, without the Commerce Clause, Peoples could not prevail on its claim. Therefore, the district court's decision was reversed. A. 14. Petitioners subsequently filed their petition to this Court on December 27, 1994.[5] J.A. 18, 27. The petition was granted on May 1, 1995. J.A. 19, 27.

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[4] This second opinion was designated "not for publication." J.A. 17.

[5] In their statement of the case, petitioners assert that jurisdiction in the district court was based in part on 42 U.S.C. § 1983. RILSA suggests that the § 1983 claim was waived by the

SUMMARY OF ARGUMENT

The bedrock issue presented in this case is whether the Twenty-first Amendment enables a state to meet the requirements of the *Central Hudson* test when that state regulates truthful, non-misleading advertising of alcoholic beverages. Contrary to petitioners' contentions, this Court has recognized a presumption of validity for governmental regulation of alcoholic beverages. The Court has also recognized the connection between advertising and demand. Furthermore, where advertising seeks to increase the demand for products and activities deemed harmful to the public – "vices" – this Court affords deference to legislative judgments.

In its application of the *Central Hudson* test, the court of appeals found that the presumption of validity drawn from the Twenty-first Amendment provided the state assistance in meeting its burden of proof for the third and fourth prongs. Not only did the state derive the benefit of the presumption, but it was also benefited in meeting its burden from the deference given to legislative judgments where vices are at issue. Furthermore, the state was assisted by the lesser protection afforded to commercial speech about vice than to any other form of protected speech.

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petitioners' complete failure to pursue it in the district court and before the court of appeals. To be sure, the claim was raised by the complaint, but was not mentioned again until the petition for writ of *certiorari* was filed in this Court. Furthermore, petitioners specifically assert that their argument "was and is squarely based upon the First Amendment." Petitioners' brief at 25.

When assessing whether a regulation on speech is not more extensive than necessary, a court may consider whether there are numerous and obvious alternatives. In this case reasonable alternatives are neither numerous nor obvious. In any event, the Rhode Island legislature's judgment that the alcohol price advertising ban advances the state's interest in temperance is reasonable and that is enough to meet the last two prongs of *Central Hudson*.

Rhode Island's policy prohibiting alcohol price advertising applies to foreign merchants when doing business in Rhode Island. Massachusetts has established a different policy which cannot legitimately overwhelm that of its neighbor. Rhode Island does not control liquor merchandising in Massachusetts; Massachusetts must not control liquor merchandising in Rhode Island.

The implications of the decision in this case reach far beyond the two statutes at issue. At stake is government's ability to continue to protect the public health, safety, morals, and welfare. Without the ability to restrict certain advertising, the government will lose one of its most effective tools against overreaching by those who would promote legal but harmful products and activities.

ARGUMENT

I. The Twenty-first Amendment vests broad authority in the individual states to regulate alcoholic beverages.

This case questions whether the Twenty-first Amendment allows a state to impose limitations on commercial

speech regarding alcoholic beverages or whether First Amendment protections override government's interest in protecting the public's health, safety and welfare. The closest the Court has come to exploring the exact question raised in this case was in *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984). At issue there was Oklahoma's provision banning alcohol advertising. The Court decided the case on preëmption grounds finding that the state ban "interfered with a regulatory area that the [Federal Communication] Commission has explicitly pre-empted." 467 U.S. at 705. Having reached that conclusion, the Court did not examine the relationship between the Twenty-first Amendment and the First Amendment. It did, however, touch upon the effect of the Twenty-first Amendment on a state's authority to regulate advertising of alcoholic beverages. Justice Brennan, writing for a unanimous court, observed:

> Although the District Court found that "consumption of alcoholic beverages in Oklahoma has increased substantially in the last 20 years despite the ban on advertising of such beverages," * * * *we may nevertheless accept Oklahoma's judgment that restrictions on liquor advertising represent at least a reasonable, albeit limited, means of furthering the goal of promoting temperance in the State.* The modest nature of Oklahoma's interests may be further illustrated by noting that Oklahoma has chosen not to press its campaign against alcoholic beverage advertising on all fronts. * * * [A] state regulatory scheme obviously need not amount to a comprehensive attack on the problems of alcohol consumption in order to constitute a valid exercise of state power under the Twenty-first Amendment * * * .

467 U.S. at 715 (emphasis added). Likewise, and quite recently, the Court approached the question in *Rubin v. Coors Brewing Co.*, 514 U.S. ___, 115 S.Ct. 1585 (1995). There a federal statute restricting commercial speech on beer labels was reviewed. The government invoked the Twenty-first Amendment in aid of its argument that its statutory scheme " 'facilitate[d]' state efforts to regulate alcohol * * * ." 115 S.Ct. at 1591. The Court rejected that notion:

> Even if the Federal Government possessed the broad authority to facilitate state powers, in this case the Government has offered nothing that suggests that States are in need of federal assistance. *States clearly possess ample authority to ban the disclosure of alcohol content* – subject, of course, to the same First Amendment restrictions that apply to the Federal Government.

Id. (emphasis added). Thus, the Court continues to recognize that the Twenty-first Amendment confers heightened regulatory authority to the states where alcoholic beverages are concerned. Ultimately the Court concluded that the label ban at issue in *Coors Brewing* failed the *Central Hudson* test "because of the overall irrationality of the Government's regulatory scheme." 115 S.Ct. at 1592.

Citing to a number of this Court's decisions, petitioners assert that: "[t]he Court has consistently rejected states' attempts to rely upon the Twenty-first Amendment as a justification for abrogating other constitutional provisions." Petitioners' brief at 27-28. Each of those decisions was made on its own merits in the light of its own facts and is not dispositive of the commercial speech

issue in this case. The litany is protracted: *Dept. of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341 (1964) (import-export clause); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971) (due process clause); *Craig v. Boren*, 429 U.S. 190 (1976) (equal protection clause); *South Dakota v. Dole*, 483 U.S. 203 (1987) (Congress' spending power); *California Retail Liquor Dealer's Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) (antitrust laws); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984) (economic protectionism); *Brown-Forman Distillers Corporation v. New York State Liquor Authority*, 476 U.S. 573 (1986) (commerce clause); *324 Liquor Corp. v. Duffy*, 479 U.S. 335 (1987) (antitrust laws); *Healy v. The Beer Institute*, 491 U.S. 324 (1989) (commerce clause); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982) (establishment clause). Petitioners' brief at 28-29. It is also unavailing.

Petitioners do not acknowledge the decisions in *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico*, 478 U.S. 328 (1986), and *United States v. Edge Broadcasting Company*, 509 U.S. ___, 113 S.Ct. 2696 (1993), much less appreciate their applicability. Their impact was recognized in *Coors Brewing* where the Court observed that in *Posadas de Puerto Rico*, "we found that the Puerto Rico Legislature's interest in promoting the health, safety, and welfare of its citizens by reducing their demand for gambling provided a sufficiently 'substantial' government interest to justify the regulation of gambling advertising." 115 S.Ct. at 1591. Furthermore, *Coors Brewing* distinguished its facts from *Edge Broadcasting*: "Unlike the situation in *Edge Broadcasting*, the policies of some States do not prevent neighboring States from pursuing their own alcohol-related policies within their respective borders."

Id. Both of those propositions appear in the instant case: 1) Rhode Island, like Puerto Rico, has an interest in promoting the health, safety, and welfare of its citizens and seeks to do so by reducing their demand for alcoholic beverages; 2) petitioners' insistence that Massachusetts retailers must be allowed to advertise in Rhode Island media would prevent Rhode Island from pursuing its own alcohol related policy.

Posadas de Puerto Rico examined the constitutionality of a Puerto Rico statute and regulations which prevented the advertising of casino gambling to Puerto Ricans although advertising to tourists was allowed. The appellants, operators of a hotel and casino, claimed that the statute was violative of the First Amendment's protection of commercial speech, both facially and as applied. The Court applied the *Central Hudson* test. Easily finding that the first two prongs of the test were satisfied, the Court turned to an analysis of the " 'fit' between the legislature's ends and the means chosen to accomplish those ends":

> The Puerto Rico Legislature obviously believed, when it enacted the advertising restrictions at issue here, that advertising of casino gambling aimed at the residents of Puerto Rico would serve to increase the demand for the product advertised. We think the legislature's belief is a reasonable one, and the fact that appellant has chosen to litigate this case all the way to this Court indicates that appellant shares the legislature's view.

478 U.S. 341-42. In the same manner, the Rhode Island legislature presumably believed[6] that eliminating price advertising would decrease the overall advertising of liquor and, thus, lessen the demand.

In *Edge Broadcasting* the federal statutory ban on broadcast lottery advertisements in non-lottery states was upheld in the face of a First Amendment challenge. Initially the Court observed:

> [T]he activity underlying the relevant advertising – gambling – implicates no constitutionally protected right; rather, it falls into a category of "vice" activity that could be, and frequently has been, banned altogether.

113 S.Ct. at 2703. Applying the *Central Hudson* test, the fit between the restriction and the government interest was found to be reasonable. Although the government could have protected its interests in other ways, the regulation was found not to be more extensive than necessary. 113 S.Ct. at 2704-2705. Importantly, the Court stated: "Within the bounds of the general protection provided by the Constitution to commercial speech, we allow room for legislative judgments." 113 S.Ct. at 2707. *Edge Broadcasting* is the clearest exposition of the current standard to be applied in the context of commercial speech advertising of various vices. The Court considered the balancing of interests between lottery and non-lottery states as "the substantial governmental interest that satisfies *Central*

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[6] The reasoning of the Rhode Island General Assembly must remain a matter of conjecture for all parties. The statutes at issue were enacted 39 years ago in 1956, 44 *Liquormart*, 39 F.3d at 6, and Rhode Island has no recorded legislative history.

Hudson." 113 S.Ct. at 2704. "We made clear in [*Board of Trustees of State Univ. of New York v.*] *Fox*, [492 U.S. 469 (1989)] that our commercial speech cases require a fit between the restriction and the government interest that is not necessarily perfect, but reasonable. * * * This was also the approach in *Posadas* * * *." 113 S.Ct. at 2705 (citations omitted).

The Court observed that Congress has banned the broadcast advertising of cigarettes.[7] From that fact it extrapolated:

> If there is an immediate connection between advertising and demand, and the federal regulation decreases advertising, it stands to reason that the policy of decreasing demand for gambling is correspondingly advanced. Accordingly, the Government may be said to advance its purpose by substantially reducing lottery advertising, even where it is not wholly eradicated.

Edge Broadcasting, 113 S.Ct. at 2707. So, too, in *Central Hudson* itself the Court observed: "There is an immediate connection between advertising and demand for electricity." 447 U.S. at 569. Thus, as the Court of Appeals for the Ninth Circuit has recognized: "[t]he Supreme Court assumes as a matter of law that advertising increases

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[7] The Court also cited *Queensgate Investment Co. v. Liquor Control Comm'n*, 69 Ohio St.2d 361, 366, 433 N.E.2d 138, 142, app. dism'd for want of a substantial federal question, 459 U.S. 807, 103 S.Ct. 31, 74 L.Ed.2d 45 (1982), where the Ohio court remarked: "an advertising prohibition aids the interest in preventing [alcoholic beverage] consumption." The speculation in the lower courts regarding the authority of *Queensgate* should lapse following the decision in the instant case.

consumption of the product or service being advertised." *Cal-Almond, Inc. v. U.S. Department of Agriculture*, 14 F.3d 429, 439 (9th Cir. 1993), *citing Posadas de Puerto Rico* and *Central Hudson*. The state's interest in promoting temperance by decreasing consumption is logically advanced by the ban on alcohol price advertising.

In decrying the power of the Twenty-first Amendment, petitioners are particularly reliant on *Larkin v. Grendel's Den, Inc.* and the nude-dancing line of cases commencing with *California v. LaRue*, 409 U.S. 109 (1972). *Larkin* is of doubtful precedential value to the case at bar in spite of the statement: "The State may not exercise its power under the Twenty-first Amendment in a way which impinges upon the Establishment Clause of the First Amendment." 459 U.S. at 123 n.5. Thus, while it is true, as petitioners point out in their brief at 29, that *Larkin* did not recognize an added presumption of constitutionality provided by the Twenty-first Amendment, the Court nonetheless commented:

> Given the broad powers of states under the Twenty-first Amendment, judicial deference to the legislative exercise of zoning powers by a city council or other legislative zoning body is especially appropriate in the area of liquor regulation.

459 U.S. at 122-23. The statute under review was not, however, a legislative exercise of zoning power, but rather a delegation of a veto power to private entities. 459 U.S. at 123. In a footnote the observation is made: "The Twenty-first Amendment reserves power to states, yet here the State has delegated to churches a power relating to liquor sales." *Id.* at n.5.

The behavior regulated in *LaRue* is admittedly a far cry from the price advertising of alcoholic beverages banned by Rhode Island's statutes. The nude-dancing cases are not important to this case for their subject matter. Rather, their significance lies in the broad language utilized by the Court to explain the scope of the Twenty-first Amendment. "The reach of the Twenty-first Amendment is certainly not without limit, but previous decisions of this Court have established that, in the context of liquor licensing, the Amendment confers broad regulatory powers on the States." *City of Newport, Ky. v. Iacobucci*, 479 U.S. 92, 95-6 (1986) (footnote omitted). "[A] State has broad power under the Twenty-first Amendment to regulate the times, places and circumstances under which liquor may be sold." *N.Y. State Liquor Authority v. Bellanca*, 452 U.S. 714, 716 (1981). The strongest endorsement of the Twenty-first Amendment is found in *LaRue*:

> While the States, vested as they are with general police power, require no specific grant of authority in the Federal Constitution to legislate with respect to matters traditionally within the scope of the police power, *the broad sweep of the Twenty-first Amendment has been recognized as conferring something more than the normal state authority over public health, welfare, and morals.*

409 U.S. at 114 (emphasis added). *LaRue* has been questioned and criticized but its authority has not been overruled. The Twenty-first Amendment still retains its force where regulation of alcohol is concerned.

Petitioners claim that in *Coors Brewing*, 115 S.Ct. at 1589-90 n.2, the Court "disaffirmed any implication that

the Twenty-first Amendment gives the State any added weight in the *Central Hudson* analysis." They also assert that: "This case is a logical extension of *Rubin*." Petitioners' brief at 10. They indulge in a very broad reading of footnote 2 in *Coors Brewing* which addresses whether *Edge Broadcasting, Posadas de Puerto Rico,* and *LaRue* affect the quantum of proof required by the *Central Hudson* test. Only *LaRue* is an alcohol case and, as the Court pointed out, it is not a commercial speech case. *Edge Broadcasting* and *Posadas de Puerto Rico* are commercial speech cases which explore the advertising of gambling. The Twenty-first Amendment is not even mentioned in the footnote. Furthermore, rebutting petitioners' position, *Coors Brewing* specifically acknowledges: "Still, *Virginia Board of Pharmacy* [*v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976)] suggested that certain types of restrictions might be tolerated in the commercial speech area because of the nature of such speech." 115 S.Ct. at 1589.

Many cases have explored the reach of the Twenty-first Amendment. Each case cited by petitioners has balanced various constitutional interests against the Twenty-first Amendment. Each has recognized that the Twenty-first Amendment must be taken into account when the subject of the case is regulation of alcohol. In just two cases, *Capital Cities Cable* and *Coors Brewing*, has the Court considered commercial speech in conjunction with the Twenty-first Amendment. Not all of the advertising ban was struck down in *Capital Cities Cable* – only that preëmpted by comprehensive federal regulations. The Court accepted Oklahoma's judgment to ban advertising. 467 U.S. at 715. In *Coors Brewing* the Twenty-first Amendment

was found to confer no augmented authority on the *federal* government's regulation of alcoholic beverages but the court noted the *states'* ample authority to ban disclosure of alcohol content. 115 S.Ct. at 1591. If the states have the authority to ban content labelling, it would follow that they have authority to ban price advertising. In fact, the Court when enumerating the alternatives to the alcohol content label ban in *Coors Brewing*, mentioned "prohibiting marketing efforts emphasizing high alcohol strength." 115 S.Ct. at 1593. *Capital Cities Cable* and *Coors Brewing* both support the premise that, by virtue of the Twenty-first Amendment, the individual states possess broad authority to regulate commercial speech about alcoholic beverages.

II. The *Central Hudson* test was properly applied by the Court of Appeals for the First Circuit.

The court in *44 Liquormart* did not find that the Twenty-first Amendment overrides the First Amendment. Rather, it found that the Twenty-first Amendment assists the state in sustaining its burden of proof when applying the *Central Hudson* test in an alcohol regulation framework. Thus, when applying the last two prongs of that test, the court of appeals found that the " 'intermediate' scrutiny of restrictions on commercial speech," *Florida Bar v. West For It, Inc.*, ___ U.S. ___, 115 S.Ct. 2371, 2375 (1995), is augmented by the Twenty-first Amendment. Petitioners argue that *Coors Brewing* expressly rejected the added presumption which the court of appeals applied in this case. Petitioners' brief at 27. Even if that were so, however, the context is quite different. The Twenty-first

Amendment was not directly involved in *Coors Brewing*. In *44 Liquormart* the court of appeals appropriately held that there is an added presumption of validity to a state's statutes regulating alcohol because of the Twenty-first Amendment. *44 Liquormart*, 39 F.3d at 8, A. 7-8.

In upholding the validity of the Rhode Island statutes pertaining to alcohol price advertising, the appeals court panel applied the *Central Hudson* test to the facts before it. Finding no need to consider the first two prongs, since there was no question presented by the first and the state's interest was stipulated,[8] the court focused on the last two issues: whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest. *Central Hudson*, 447 U.S. at 566. Petitioners assert that the court incorrectly resolved those questions. However, when the issues are viewed in the light of a spectrum of this Court's commercial speech decisions, the court of appeals' opinion is clearly right.

A. The statutes under review directly advance the state's interest in promoting temperance.

The court of appeals, first noting that the burden of proof is on the party seeking suppression, determined that the district court had applied too strict a test. In deciding whether a statute directly advances the state's

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[8] Several *amici* focus arguments on whether the state sustained its burden of proof of the second prong of the *Central Hudson* test. That fixation is highly inappropriate since the interest was stipulated and neither the district court nor the court of appeals considered the question at all.

interest, "[i]t is not correctness, it is reasonableness." 44 *Liquormart*, 39 F.3d at 7, A. 5. The court looked to a wider range of this Court's cases than do petitioners. Thus, it recognized that the *Central Hudson* phrase "directly advances" is not absolute. *Id.*

In support of that recognition, the court cited *Edenfield v. Fane*, 507 U.S. ___, 113 S.Ct. 1792 (1993), which addressed whether a certified public accountant has a protected First Amendment right to solicit business personally. Florida law prevented that practice. This Court observed:

> [L]aws restricting commercial speech, unlike laws burdening other forms of protected expression, need only be tailored in a reasonable manner in order to survive First Amendment scrutiny.

113 S.Ct. at 1798. Applying "this intermediate standard of review," the Court found that the regulation of Certified Public Accountants by the State of Florida was unduly burdensome on First Amendment rights. Basically, in *Edenfield* the fit between the stated interests and the regulation was found to be missing even under a "reasonable manner" standard.

There is a difference in that standard when the Court speaks of advertising of professional services and when it considers advertising of vices. Two lines of cases have emerged in commercial speech cases: one concerning an individual's right to market his or her profession and the other addressing the state's right to protect the health, safety and welfare of its citizens from various vices. *Edge Broadcasting* characterized vice activities as those that

"[can] be, and frequently [have] been, banned altogether." 113 S.Ct. at 2703. Adopting that characterization, the control of alcohol qualifies as the regulation of a vice. In fact, this Court has specifically categorized alcohol with cigarettes, gambling and prostitution as "products or activities deemed harmful." *Posadas de Puerto Rico*, 478 U.S. at 346. *Posadas de Puerto Rico* and *Edge Broadcasting* typify the approach taken by this Court when government regulates advertising of vice activities.

Central Hudson established the test by which regulation of commercial speech is to be measured. However, developments since *Central Hudson* have not altered the secondary status afforded commercial speech in the pantheon of First Amendment's rights. Furthermore, as the most recent cases show, particularly *Edge Broadcasting*, even within the commercial speech category there is a hierarchy of more and less protected areas of speech. Where vice is concerned, more leeway is allowed and this Court defers to the legislative judgment. Just as there are two levels of First Amendment speech protection, commercial speech being subordinate to noncommercial speech, there are two levels of commercial speech protection – vice regulation and professional regulation are afforded different levels of First Amendment protection.

After the decisions in *Posadas de Puerto Rico* and *Edge Broadcasting*, there can be no doubt that the *Central Hudson* test is currently considerably less exacting than originally formulated. In fact, this Court has explicitly recognized that "other formulations in our commercial speech cases support a more flexible meaning for the *Central Hudson* test." *Fox*, 492 U.S. at 477. After all, "[t]here are common sense differences between speech

that does 'no more than propose a commercial transaction,' * * * and other varieties." *Virginia State Board of Pharmacy*, 425 U.S. at 771 n.24. Petitioners' failure to acknowledge this second line of cases considerably weakens their claims before this Court.

The most recent case applying the *Central Hudson* test is *Florida Bar*. There, the Court denied a First Amendment challenge to a court rule forbidding lawyers' solicitations of victims or their families within 30 days of an accident or a disaster. The Court emphasized the breadth of the record developed by the Florida Bar prior to presenting its recommendations to the court. It went on to say, however:

> [I]n other First Amendment contexts, we have permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether, see *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50-51 (1986); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 584-585 (1991) (Souter, J., Concurring in the judgment), or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus, and "simple common sense," *Burson v. Freeman*, 504 U.S. 191, 211 (1992). Nothing in *Edenfield, supra*, a case in which the State offered *no* evidence or anecdotes in support of its restriction, requires more.

115 S.Ct. at 2378 (emphasis in original). In the instant case both the district court and the court of appeals agreed that there was "no empirical evidence either way." 44 *Liquormart*, 39 F.3d at 7, A. 6. Although both plaintiffs and defendants presented their experts, the district court noted "a pronounced lack of unanimity among

researchers who have studied the effects of alcohol advertising." *44 Liquor Mart*, 829 F.Supp. 543, 546 (1993), *rev'd sub nom. 44 Liquormart, Inc. v. Rhode Island*, 39 F.3d. 5 (1st Cir. 1994). Lacking proof positive that the price ban advanced the state's asserted interest and unpersuaded that the Twenty-first Amendment altered the equation, the district court found that the state had not carried its burden of proof. 829 F.Supp. at 554. The court of appeals disagreed.

The court of appeals observed that: "there would seem inherent merit in the State's contention that competitive price advertising would lower prices, and that with lower prices there would be more sales." *44 Liquormart*, 39 F.3d at 7, A. 7. It commented that: "the State is entitled to a reasonable choice." *44 Liquormart*, 39 F.3d at 7, A. 6. The court of appeals properly accepted Rhode Island's determination. This Court does not require empirical evidence to rebut the policy determinations of state legislatures. Room is allowed for legislative judgment. *Edge Broadcasting*, 113 S.Ct. at 2707. Furthermore, the court of appeals recognized that the Twenty-first Amendment adds weight to the state's regulation of intoxicating liquors when applying the *Central Hudson* test.

Petitioners assert that: "Under *Central Hudson* the government must prove an 'immediate connection' between the government's asserted interest and the prohibition on speech." Petitioners' brief at 15. That is simply not what *Central Hudson* holds. The immediate connection that the Court there found was between advertising and demand. The Court further pointed out that: "Central Hudson would not contest the advertising ban unless it believed that promotion would increase its

sales." 447 U.S. at 569. That is exactly the point at issue in this case with the addition of the question whether increasing alcoholic beverage sales is a worthy First Amendment goal.

Petitioners are chagrined by the court of appeals' finding that "[a]dvertising must be generally productive or so much money would not be spent on it." *44 Liquormart*, 39 F.3d at 8, A. 7; petitioners' brief at 19. This Court, of course, agrees with the court of appeals' proposition. *See Central Hudson*, 447 U.S. at 569; *Posadas de Puerto Rico*, 478 U.S. at 341-42; *Edge Broadcasting*, 113 S.Ct. at 2707. Further, petitioners charge that the court of appeals failed to consider that advertising expenditures have been rising while consumption has been decreasing. Petitioners' brief at 19. The court of appeals was not presented with that "salient fact," *id.*, so it should come as no surprise to petitioners that it was not considered.[9]

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[9] Petitioners' respect for the record below contains some holes. At trial the petitioners attempted to have the vintage New York State Moreland Commission on the Alcoholic Beverage Control Law, *Report and Recommendations No. 3*, January 21, 1964, introduced as a full exhibit. Respondents objected arguing that the report was hearsay and had not been relied on by petitioners' experts. Petitioners contended that the report was admissible under either Federal Rules of Evidence 803(8) or 803(18). The trial judge sustained the state's objection. The report was, thus, not before the trial justice. Nevertheless, petitioners relied on the report in their brief to the court of appeals. Respondents again objected, arguing that the report was not a part of the record. Tenaciously, petitioners again relied on the Moreland Report in their petition to this court and in their brief on the merits. Petitioners' brief at 18, n.11. They observe that the report "has been noticed by several courts in ruling on alcoholic beverages related issues." In those cases the report was on the

Citing *Central Hudson*, petitioners appear to argue that Rhode Island's price advertising ban is a "blanket ban on commercial speech." Petitioners' brief at 20, *quoting Central Hudson*, 447 U.S. at 566, n.9. Nothing could be further from the truth. The ban only extends to advertisement of the prices at which alcoholic beverages are offered for sale. All other advertising of alcoholic beverages is permitted in Rhode Island. National advertising is omnipresent. The Rhode Island legislature may well have believed that the ban on price advertising would lower the overall incidence of alcohol promotions. Generally speaking the available beverages do not vary substantially from retailer to retailer. Thus, the only major difference between one liquor store and another may be the prices at which the alcohol is sold. Without being able to advertise lower prices, merchants may well decide not to advertise at all. To the extent that the ban reduces overall advertising by retailers who believe it is not cost effective, the state's interest in promoting temperance is furthered.

Because the state had the burden of proof under *Central Hudson*, petitioners fault the court of appeals for finding that the district court was not "free to choose." Petitioners' brief at 13-14. In support of their view that,

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record. That report is not a part of the record in this case and petitioners' reliance on it is entirely misplaced. Petitioners at least tried to introduce the Moreland report, which is more than they did with M. J. Waterson, ADVERTISING BRANDS AND MARKETS, (Advertising Ass'n Monograph, 2nd ed. 1985) on which they relied in their petition 23-24 n.11, and on which they continue to rely in their brief at p. 20. That report is directed to any court's attention for the first time in their petition and brief.

when insufficient proof is presented by both parties the party bearing the burden must lose, they rely on *Pennsylvania R. Co. v. Chamberlain*, 228 U.S. 333 (1933). *Chamberlain* is a tort case dating from 1932. There a train brakeman was killed in the railroad yard, an event to which there were no direct eyewitnesses. The opinion explores the inferences to be drawn from what was observed and the angle of the vantage spot. The language quoted indeed appears. 228 U.S. at 339. Otherwise the case is unpersuasive in a First Amendment context. The court of appeals in effect found that the district court had exceeded its authority in finding: "Rhode Island's off-premises liquor price advertising ban has no significant impact on levels of alcohol consumption in Rhode Island." *44 Liquor Mart*, 829 F.Supp. at 549, A. 31. There was "no empirical evidence either way." 39 F.3d at 7, A. 6. Thus, "the State is entitled to a reasonable choice. This includes choice of method – it is not obliged to prove that some other method, e.g., taxation, would be less effective." *Id.* The court of appeals cited *Fox*, 492 U.S. at 478:

> [W]e have not insisted that there be no conceivable alternative, but only that the regulation not "burden substantially more speech than is necessary to further the government's legitimate interest," * * * . *And we have been loath to second-guess the Government's judgment to that effect.*

(Citations omitted; emphasis added.) Thus, the court was following the dictates of this Court.

The court of appeals' opinion follows this Court's precedents in the commercial speech arena. Petitioners' reliance on cases analyzing commercial speech in the advertising of professional services is unavailing. This is

not a case where "what is at stake is the suppression of information and knowledge that transcends the financial self-interests of the speaker." *Florida Bar*, 115 S.Ct. at 2382 (Kennedy, J., dissenting). At issue in this case is advertising that does no more than propose a commercial transaction. Petitioners want to sell more liquor and would like to advertise low prices to do so. The state has an interest in promoting temperance and, thus, does not want to encourage more liquor sales. The price advertising ban directly advances the state's interest and the court of appeals correctly so found.

B. The statutes under review are no more extensive than necessary to serve the state's interest in promoting temperance.

In *Fox* the Court clarified the application of "necessary" in the last element of the *Central Hudson* test, "not more extensive than is necessary to serve that interest." The standard is *not* one of least-restrictive-means but is instead similar to the test for time, place, and manner restrictions on protected speech: "[T]he reason of the matter requires something short of a least-restrictive means standard." 492 U.S. at 477. Rather:

> What our decisions require is a " 'fit' between the legislature's ends and the means chosen to accomplish those ends," * * * – a fit that is not necessarily perfect, but *reasonable*; that represents not necessarily the single best disposition but one whose scope is "in proportion to the interest served;" * * * that employs not necessarily the least restrictive means but, * * * a means tailored to achieve the desired objective.

> Within those bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed.

492 U.S. at 480 (citations omitted; emphasis added).

Without citing to any specific language so holding, petitioners maintain that the court of appeals adopted a rational-basis test for determining whether the statutes are more extensive than necessary. Petitioners' brief at 23. Reference to the opinion demonstrates that petitioners are just plain wrong: the test applied by the court of appeals was that of "reasonableness." 39 F.3d at 7, A. 5. That is precisely the standard applied by the decisions of this Court. *Fox*, 492 U.S. at 480; *Edge Broadcasting*, 113 S.Ct. at 2705. The standard applied by the district court and rejected by the court of appeals approached a least-restrictive-means test. That more stringent test was specifically rejected in *Fox*. 492 U.S. at 480-81.

Certainly the ban on price advertising is narrowly drawn and encroaches minimally on plaintiffs' First Amendment rights to commercial free speech. In Rhode Island they are welcome to advertise any truthful facts regarding the products which they offer to sell except the price at which they sell them. The challenged statutes represent a legislative judgment that the ban advances the state's interest in temperance among its citizens. The state is allowed to make that choice. *44 Liquormart*, 39 F.2d at 7, A. 6; *Edge Broadcasting*, 113 S.Ct. at 2707. The Rhode Island price advertising ban decreases alcohol advertising within the state, even though it does not entirely eradicate it. Under *Edge Broadcasting*, that is a constitutionally sound legislative policy.

The trial judge referred to alternatives which the legislature might have chosen: "higher sales taxes or minimum consumer prices." *44 Liquor Mart, Inc. v. Racine*, 829 F.Supp. at 554, A. 45. The petitioners have adopted those alternatives as their own. Petitioners' brief at 23. They rely on *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. ___, 113 S.Ct. 1505 (1993), and *Coors Brewing* to make their point that the availability of alternatives indicates that the statutes are not sufficiently narrowly drawn to satisfy the *Central Hudson* test. *City of Cincinnati* refers to "numerous and obvious less-burdensome alternatives." 113 S.Ct. at 1510 n.13. *Coors Brewing* points out several alternatives to the alcohol content label ban. 115 S.Ct. at 1593. The alternatives to the price advertising ban are certainly not numerous and have obvious problems. Raising taxes on liquor would likely kill the industry in Rhode Island where staying in-state requires more ingenuity than getting out of it. Creating a state minimum price would raise antitrust and constitutional problems of its own. *324 Liquor Corp. v. Duffy; California Retail Liquor Dealer's Ass'n v. Midcal Aluminum, Inc.* The decision in *Edge Broadcasting* validated the *Fox* approach: "not necessarily perfect, but reasonable." *Edge Broadcasting*, 113 S.Ct. at 2705. That is the test appropriately applied by the court of appeals.

Reasonably viewed the Rhode Island statutes prohibiting alcohol price advertising, albeit limited, are constitutionally acceptable means of furthering the goal of promoting temperance in the state. *Capital Cities Cable*, 467 U.S. at 715. The court of appeals was entirely in concert with the decisions of this Court in that regard. The statutes under review pass constitutional muster.

III. Rhode Island's ban on alcohol price advertising is constitutionally applicable to out-of-state retailers.

Although it is not entirely clear that the issue is included within the question propounded by this Court, petitioners maintain that the price-advertising ban cannot apply to an out-of-state entity. Petitioners' brief at 24. The point petitioners fail to grasp is that the applicable Rhode Island statute, R.I. Gen. Laws § 3-8-8.1, A. 49, applies only to activity taking place within the circumscribed borders of that state. Quoting *Bigelow v. Virginia*, 421 U.S. 809, 824-25 (1975), petitioners take issue with the court of appeals' statement: "if a party wishes to come into a state and do business, to some extent at least, it should be subject to the same regulations as are its local counterparts." 44 *Liquormart*, 39 F.3d at 9, A. 10-11. *Bigelow*, however, does not require that Rhode Island must allow alcohol price advertising by out-of-state retailers. Selling alcoholic beverages is legal in Massachusetts; Rhode Island does not attempt to bar retailers from disseminating information regarding that activity. Nevertheless, *Bigelow* does not go so far as to permit Massachusetts law allowing price advertising to dictate to Rhode Island what its laws must provide. "Advertising, like all public expression may be subject to reasonable regulation that serves a legitimate public interest." 421 U.S. at 826. Rhode Island has determined that its temperance interest is served by prohibiting alcohol-price advertising. Massachusetts has made a different decision regarding price advertising, but its policies cannot be imposed upon a sister state pursuant to any authority derived from *Bigelow*. The majority decision in *Edge Broadcasting* implicitly recognized that fact when it refused to acknowledge the

dissent's interpretation of *Bigelow*'s sway. *See Edge Broadcasting*, 113 S.Ct. at 2708-09 (Stevens, J., dissenting).

Plaintiffs claim that the alcohol-price advertising ban "concerns the sale of products outside [Rhode Island's] jurisdiction." Petitioners' brief at 24. They further imply that Rhode Island is regulating economic activity in Massachusetts. The Rhode Island measures regarding price advertising have absolutely no impact on what Massachusetts retailers may or may not do in Massachusetts. The statutes do control what a Massachusetts retailer may do in Rhode Island. However, it is entirely within the scope of Rhode Island's police power, even without resort to the Twenty-first Amendment, to regulate within its borders retailers' commercial activities whether those retailers be from Rhode Island, Massachusetts, or any other jurisdiction. As the court of appeals observed, "if a party wishes to come into a state and do business, to some extent, at least, it should be subject to the same regulations as are its local counterparts." *44 Liquormart*, 39 F.3d at 9, A. 10-11.

Rhode Island's ban on the advertising of liquor prices in Rhode Island media outlets is a reasonable exercise of its power to regulate alcohol under the Twenty-first Amendment. All other advertising of liquor is allowed. Thus, information regarding brand availability, assortment, and quality may be readily advertised in Rhode Island media sources by both Rhode Island merchants and those from Massachusetts. Rhode Island does not exert any control over what its citizens may buy in Massachusetts. Furthermore, of course, the Rhode Island regulations make no effort to curb Massachusetts price advertising in Massachusetts media outlets. A dealer in

Massachusetts may advertise his prices in Massachusetts without regard to any Rhode Island regulation. Indeed, he may advertise his wares in Rhode Island without offending any law or regulation. What he cannot do is to advertise the price of his wares in Rhode Island newspapers, through Rhode Island radio station advertisements or Rhode Island television station commercials. Rhode Island retailers are subject to the exact same strictures. The relationship between Massachusetts and Rhode Island advertisers is the same as that at issue in *Edge Broadcasting* between North Carolina and Virginia advertisers. On the issue of out-of-state advertisers, the decision in *Edge Broadcasting* is controlling.

IV. A finding that Rhode Island's statutes are unconstitutional will have reverberating results for federal, state, and local governments.

There is a larger issue than Rhode Island's two statutes lurking in the wings of this case. The broader question is to what extent government, federal, state, or local, is able to legislate to protect the health, safety, and welfare of its citizens from rampant advertising of *harmful* products or activities. In *Virginia State Board of Pharmacy* the court deprecated the "highly paternalistic approach" represented by a ban on advertising the price of prescription drugs. 425 U.S. at 770. On the other hand, in *Posadas de Puerto Rico* and *Edge Broadcasting* advertising bans on gambling activities were sustained. Of course, prescription drugs are a necessity and gambling, for the unaddicted, is most certainly not. The same holds for cigarettes, alcohol, and prostitution, which are not necessary to maintain a quality of life except for those whose

lives revolve around them. Does government have the duty to take steps designed to minimize the incidents of addiction to such "vices" among its constituents? Does it have the right to do so? If there is an immediate connection between advertising and demand, *Central Hudson*, 447 U.S. at 569, may advertising of vices be regulated consistent with the First Amendment? *Central Hudson* stands for the proposition that under certain circumstances the First Amendment must give way to other governmental interests. Decreasing incidences of addiction is just such a governmental interest. To the extent that advertising increases the demand for vices, advertising should continue to be subject to governmental regulation.

In both *Edge Broadcasting* and *Posadas de Puerto Rico* deference was paid to the legislative judgment which restricted the advertising of gambling. *Edge Broadcasting*, 115 S.Ct. at 2707; *Posadas de Puerto Rico*, 478 U.S. at 344. Such deference has not been accorded to regulation of professionals marketing their careers. Thus, in *Edenfield v. Fane*, although the state's interest was found to be substantial, there was no deference paid to the Florida legislature's scheme. 113 S.Ct. at 1798. The result was similar in *Ibanez v. Florida Dept. of Business and Professional Regulation*, ___ U.S. ___, 114 S.Ct. 2084 (1994). RILSA urges the Court to apply its approach to the gambling advertising cases, rather than that to the career advertising cases, to the other areas of vice as they arrive in this forum.

A finding that Rhode Island's statutes are constitutionally infirm could seriously implicate the validity of the ban on broadcast advertising of cigarettes. 15 U.S.C.

§ 1335. The constitutionality of that provision was challenged in *Capital Broadcasting Company v. Mitchell*, 333 F.Supp. 582 (D.D.C. 1971) summarily aff'd *sub nom. Capital Broadcasting Co. v. Acting Attorney General*, 405 U.S. 1000 (1972). Presumably if Rhode Island may not ban alcohol price advertising, it is equally unconstitutional for the federal government to ban cigarette broadcast advertising.

In like manner, Nevada has legalized prostitution under certain restrictions. Nev.Rev.Stat. § 244.345. It balances that legalization with restrictions on advertising the availability of the activity. Nev.Rev.Stat. §§ 201.430, 201.440. If Rhode Island may not restrict some form of alcohol advertising then it seems likely that The Chicken Ranch brothel in Nye County, Nevada, can erect billboards throughout the state and beyond. *Princess Sea Industries v. State, Clark County*, 635 P.2d 281, 284 (Nev. 1981) (Manoukian, J. concurring).

Currently, the Distilled Spirits Council of the United States (DISCUS) voluntarily refrains from broadcast advertising. That is apparently because it is convinced that, were its members to initiate radio and television advertising, Congress would immediately enact a ban. Steve Younger, *Alcoholic Beverage Advertising on the Airwaves: Alternatives to a Ban or Counteradvertising*, 34 UCLA L. Rev. 1139, 1145 (1987). Should Rhode Island's statutes fall, the threat would be empty and DISCUS would be free to take to the airways. The likelihood of that scenario coming to pass is strengthened by the fact that DISCUS is an *amicus* in support of petitioners in this case.

Maryland has delegated to the City of Baltimore the authority to restrict certain advertising of alcoholic beverages "necessary for the promotion of the welfare and temperance of minors." *Anheuser-Busch v. Mayor and City Council,* 855 F.Supp. 811, 812-13 (D.Md. 1994). Baltimore responded by enacting a ban on billboards advertising spirituous beverages. The constitutionality of the ordinance was challenged. Applying the *Central Hudson* test, the district court rejected the First Amendment claim relying on this Court's "deference to a legislative judgment that advertising increases consumption." 855 F.Supp. at 818. That determination is pending decision in the Court of Appeals for the Fourth Circuit. There are no doubt a myriad of state and local laws guarding public health, safety, morals, and welfare that would become suspect if Rhode Island's legislative judgment is discarded.

President Clinton has proposed sweeping measures to attack the problem of teen-age smoking. He was answered with an immediate suit by the tobacco industry and a promised complaint by the advertising industry. *Nicotine Attack, Cigarette Regulation Is Formally Proposed; Industry Sues to Halt It,* WALL ST. J., Aug. 11, 1995, at A1, A10. While the announcement is only the opening salvo in a new government initiative, should the Court hold that commercial advertising of harmful activities cannot be regulated, a large portion of the proposal will be left twisting in the wind.

There will be far-reaching ramifications to the decision in this case. RILSA urges the Court to consider not just the discrete measures directly before it, but also the many areas where restrictions on advertising may be

government's only weapon in an uphill battle against various vices.

CONCLUSION

For all of the foregoing reasons, respondent Rhode Island Liquor Stores Association respectfully urges that the decision of the Court of Appeals for the First Circuit be sustained.

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No. 94-1140

Supreme Court, U.S.
FILED
AUG 21 1995
CLERK

In The

Supreme Court of the United States

October Term, 1995

44 LIQUORMART, INC. and PEOPLES SUPER LIQUOR STORES, INC.,

Petitioners,

v.

STATE OF RHODE ISLAND, and RHODE ISLAND LIQUOR STORES ASSOCIATION,

Respondents.

On Writ Of Certiorari To
The United States Court Of Appeals
For The First Circuit

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TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 1

A. The Statutory and State Appellate Background 1

B. Facts and Procedural History of the Present Case 3

SUMMARY OF ARGUMENT 9

ARGUMENT 11

A. A Decision Upholding Rhode Island's Alcohol Advertising Ban Would Be Consistent With Recent Decisions of This Court 11

B. With or Without the Twenty-first Amendment, the State Proved That The Price Advertising Ban Directly and Materially Advanced Its Asserted Interest and That It Was No More Extensive Than Necessary 18

1. Rhode Island's Price Advertising Ban Directly Advances Its Asserted Interest of Promoting Temperance and Controlling The Traffic in Alcoholic Beverages 21

2. Rhode Island's Price Advertising Ban Is No More Extensive Than Necessary 29

C. The Twenty-first Amendment Should Be Considered in a Commercial Speech Case Involving the Regulation of Alcoholic Beverages ... 37

CONCLUSION 42

TABLE OF AUTHORITIES

Page

CASES:

Actmedia, Inc. v. Stroh, 830 F.2d 957 (9th Cir. 1986) 39

Adolph Coors Company v. Bentsen, 2 F.3d 355 (10th Cir. 1993) 11

Bates v. State Bar of Arizona, 433 U.S. 350 (1977) 26

Board of Trustees of State University of New York v. Fox, 492 U.S. 469 (1989) ..... *passim*

Bolger v. Youngs Drug Products, Corp., 463 U.S. 60 (1983) 17

Cal-Almond, Inc. v. U.S. Dept. of Agriculture, 14 F.2d 429 (9th Cir. 1993) 21

California Retail Liquor Dealers Association v. MidCal Aluminum, Inc., 445 U.S. 97 (1980) 27, 37

Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582 (D.D.C. 1971) 32

Central Hudson Gas & Electric Corporation v. Public Service Commission of New York, 447 U.S. 557 (1980) ..... *passim*

City of Newport, Kentucky v. Iacobucci, 479 U.S. 92 (1986) 39

Dunagin v. City of Oxford, 718 F.2d 738 (5th Cir. 1983) 32, 36, 39

Edenfield v. Fain, 113 S.Ct. 1792 (1993) 18, 19, 21, 22, 32, 33

Florida Bar v. Went-For-It, Inc. and John T. Blakely, No. 94-226, June 21, 1995 ..... *passim*

44 Liquor Mart Inc. v. Racine, 829 F. Supp. 543 (D.R.I. 1993) 4, 6, 7

TABLE OF AUTHORITIES – Continued

Page

44 Liquormart, Inc. v. State of Rhode Island, 39 F.3d 5 (1st Cir. 1994) 7, 8, 39

Friedman v. Rogers, 440 U.S. 1 (1979) 32

Larkin v. Grendels Den, Inc., 459 U.S. 116 (1982)..... 39

Ohralik v. Ohio State Bar Association, 436 U.S. 447 (1978) 15, 18, 32, 35

Olitsky v. O'Malley, 597 F.2d 295 (1st Cir. 1979)..... 39

Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico, 478 U.S. 328 (1986)..... 21, 35, 36, 37

Princess Sea Indus., Inc. v. State of Nevada, 635 P.2d 281 (Nev. 1981)..... 32

Queensgate Investment Company v. Liquor Control Comm'n, 69 Ohio St. 361, 433 N.E. 2d 138 (1982), appeal dismissed, 459 U.S. 807..... 19, 20, 21, 32

Rhode Island Liquor Stores Association v. The Evening Call Publishing Company, 497 A.2d 331 (R.I. 1985) 2

Rubin v. Coors, 115 S.Ct. 1585 (1995) ..... *passim*

S & S Liquormart, Inc. v. Pastore, 497 A.2d 729 (R.I. 1985)..... 1, 32

South Dakota v. Dole, 483 U.S. 203 (1987) 37

United States v. Edge Broadcasting, 113 S.Ct. 2696 (1993) 21, 22, 32, 37

Ward v. Rock Against Racism, 491 U.S. 781 (1989) 31

TABLE OF AUTHORITIES – Continued

Page

STATUTES:

R.I. Gen. Laws § 3-1-5 ..... 1, 18, 19

R.I. Gen. Laws § 3-8-7 ..... 1, 3, 13

R.I. Gen. Laws § 3-8-8.1 ..... 1, 2, 3, 13

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STATEMENT OF THE CASE

A. The Statutory and State Appellate Background

Pursuant to the Twenty-first Amendment's grant of power, the State of Rhode Island (hereinafter "the State") has adopted a statutory scheme for the regulation of alcoholic beverages. R.I. Gen. Laws § 3-1-1 through § 3-14-15, inclusive. The purpose of this statutory scheme is the "promotion of temperance and for the reasonable control of the traffic in alcoholic beverages." R.I. Gen. Laws § 3-1-5. An integral part of that scheme includes a prohibition on the advertising of the *price* of alcoholic beverages by the Rhode Island media, and by the license holders themselves. R.I. Gen. Laws §§ 3-8-7 and 3-8-8.1.

In *S & S Liquormart, Inc. v. Pastore*, 497 A.2d 729 (R.I. 1985), the Rhode Island Supreme Court upheld § 3-8-7 (prohibition against advertising directed to manufacturers, wholesalers, shippers and license holders) against a constitutional assault based upon the First Amendment. Plaintiff in that case claimed § 3-8-7 violated the First Amendment, Commerce Clause, and Equal Protection guarantees and the Sherman Anti-Trust Act. The Rhode Island Supreme Court stated that:

> under its general police power, [the State] has a substantial interest in the health and welfare of its citizens, including the stability of its families and their safety while on Rhode Island highways, all of which are clearly affected by the abuse of alcohol.
>
> *Added* to this already substantial interest is the power of [Rhode Island] under the Twenty-first Amendment to regulate the sale, and the incidence thereof, of alcoholic beverages, and to

> protect its citizens from the evils incident to alcohol.

Id. at 732 (footnotes and citations omitted).

The Rhode Island court held that a state statute regulating the sale of alcoholic beverages is entitled to an added presumption in favor of its validity because of the Twenty-first Amendment. *Id.* at 732. After an analysis of relevant case law, the Court upheld the statute as constitutional on all four grounds.

A companion case, *Rhode Island Liquor Stores Association v. The Evening Call Publishing Company,* 497 A.2d 331 (R.I. 1985), involved an attack on the constitutionality of § 3-8-8.1. (prohibition against advertising directed to media and advertising agencies). A liquor retailing trade group brought the action against a newspaper to obtain injunctive relief against the newspaper's publication of out of state liquor advertisements containing price information in violation of the state statutes. The statute was assailed on First Amendment and Commerce Clause grounds. The Rhode Island court noted explicitly that it did not find it "unreasonable for the State of Rhode Island to believe that price advertising will result in increased sales of alcoholic beverages generally." *Id.* at 336. The court noted that the State did not have to demonstrate with expert or other testimony that increased sales of alcoholic beverages correlate highly with the dissemination of liquor price information. *Id.* at 337.

B. Facts and Procedural History of the Present Case

On December 17, 1991, Petitioner 44 Liquor Mart, Inc. (hereinafter "44 Liquor Mart") was found to be in violation of R.I. Gen. Laws §§ 3-8-7 and 3-8-8.1 and Regulation 32[1] of the Rhode Island Liquor Control Administration, which also prohibits price advertising. 44 Liquor Mart was fined for that violation, paid the fine, but did not take advantage of the appeal process provided by state statute.[2] See generally Rhode Island's Administrative Procedures Act, R.I. Gen. Laws § 42-35-1 *et seq.* Subsequently, on February 28, 1992, Petitioners filed a constitutional attack on the price advertising ban in the Federal District Court for the District of Rhode Island. *44 Liquor Mart, Inc. v. Racine*, C.A. No. 92-0115-P. Petitioners' claims were based on the First Amendment of the United States Constitution; the Equal Protection, Due Process and Commerce Clauses of the United States Constitution; the Sherman Anti-Trust Act, 15 U.S.C. §§ 1-7 and 42 U.S.C. § 1983, the Civil Rights Act. In their Complaint, Petitioners alleged that the advertising ban caused them to suffer "economic harm in the form of lost business opportunity" and that they had "incurred monetary damages . . . ".

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[1] Regulation 32 prohibits any "reference to price" of any alcoholic beverages or mixture of alcoholic beverages (Appendix to Petitioner's Brief at 2).

[2] Petitioner People's Super Liquor is not a Rhode Island license holder. No administrative action has ever been taken against it.

(Joint Appendix 32-36[3]). Before trial, Petitioners abandoned all but their First Amendment claims. (Appendix to Petition for Writ of Certiorari at 19)[4].

Prior to trial, the parties stipulated (among other things) that Petitioners would *each* realize an economic benefit of more than $100,000 *per year* if the price advertising ban were lifted, that the proposed speech does not concern an illegal activity and presumably would not be false or misleading, and that the State of Rhode Island has a substantial interest in regulating the sale of alcoholic beverages. (J.A. 46-48), *44 Liquor Mart Inc. v. Racine*, 829 F. Supp. 543, 545 (D.R.I. 1993) (App. 21, 22).

At trial, the agreed statement of facts and the videotaped depositions of three experts with supporting exhibits were introduced in full and reviewed by the District Court. Briefly, the evidence showed the following: the State's expert, Dr. Henry Saffer, an economist, applied generally accepted economic principles to find that the advertising ban did in fact have a direct effect on consumption. Dr. Saffer testified that the ban affected consumption in two ways; by increasing the "search time" involved in purchasing the product, and by increasing the real price of the product. (J.A. 69-71). Since no one disputed that price does affect consumption, the link was forged.

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[3] References to the Joint Appendix are hereinafter designated as "J.A.".

[4] References to the Appendix to Petition for Writ of Certiorari are hereinafter designated as "App.".

Dr. Saffer also testified that, based on proven economic theories, if the advertising ban were lifted, the result would be lower prices and increased consumption. (J.A. 73). He explained that "if the ban on price advertising were removed then the average price would go down, and the reason the average price goes down is people can more easily find lower prices." (J.A. 71).

The testimony of Dr. Reginald Smart offered on behalf of the Petitioners dovetails with that of Dr. Saffer, as follows: There are some research experts who believe that alcohol advertising leads to increased overall consumption. There are two camps in this area – those who claim that advertising affects only brand shares, i.e., the liquor and advertising industries versus governmental entities and others who feel that advertising does indeed increase consumption. Those falling into the latter category include the American Medical Association, and John Kenneth Galbraith, the noted economist and scholar. There are at least *twelve* differing conclusions regarding the impact of advertising on the consumption of alcoholic beverages. Dr. Smart testified that price is a potent influence of the level of alcohol consumption. As real prices go up, consumption goes down. Inversely, as prices go down, consumption increases. Dr. Smart admitted that lowering prices of alcoholic beverages will probably make people drink a little more. Dr. Smart also testified that advertising bans may affect certain specific segments of the population, such as heavier drinkers and those most exposed to television. He acknowledged that those who watch television more tend to drink more. (J.A. 78, 81) (Transcript of March 11, 1993, p.46).

Another of Petitioners' experts, Dr. David J. Pittman, bolstered the State's position when he admitted that he was aware of ***no empirical evidence*** which would refute the State's conclusion that banning alcohol price advertising promotes temperance. (J.A. 83). Dr. Pittman's own report indicates that price advertising leads to lower costs for the consumer, and admits that if the price advertising ban in Rhode Island were to be repealed, that lower prices would be a direct result. (J.A. 84). Dr. Pittman is aware of and acknowledges that there are studies indicating that advertising plays a slight role in consumption. (J.A. 85).

On August 10, 1993, the District Court issued an opinion finding for the Petitioners. *44 Liquor Mart Inc. v. Racine*, 829 F.Supp. at 555. In striking down the advertising ban, that Court held that in a commercial speech analysis, the Twenty-first Amendment has no application. *44 Liquor Mart Inc. v. Racine*, 829 F.Supp. at 553 (App. 42). The District Court applied the four-part test developed in *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*, 447 U.S. 557 (1980):

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Id. at 566. (App. 35).

In its opinion, the District Court noted the "pronounced lack of unanimity among researchers who have studied the effects of alcohol advertising," and noted that the Petitioners' experts had testified that "there is no empirical evidence that the presence or absence of alcohol price advertising significantly affects levels of alcohol consumption." *44 Liquor Mart v. Racine*, 829 F.Supp. at 546 (App. 22, 23). In placing the burden upon the State to justify the restriction on advertising, the Court held that " . . . the Twenty-first Amendment does not require a modification of either the level or allocation of the burden of proof in commercial speech cases involving the regulation of the sale of alcoholic beverages". *44 Liquor Mart v. Racine*, 829 F.Supp. at 553 (App. 42).

The decision was appealed, and initially the First Circuit affirmed the District Court's ruling as it applied to foreign retailers, but reversed as to retailers located within the State of Rhode Island. (J.A. 16). After rehearing, the panel on July 8, 1994 ordered the first opinion withdrawn and issued a second opinion that differed only slightly from the first. (J.A. 17). After yet another rehearing, the First Circuit issued a third opinion reversing the decision of the U.S. District Court in its entirety. *44 Liquormart, Inc. v. State of Rhode Island*, 39 F.3d 5 (1st Cir. 1994) (App. 1).

The First Circuit, in applying the four part *Central Hudson* test noted that the first two prongs were not at issue. *44 Liquormart, Inc. v. State of RI*, 39 F.3d at 6, 7 (App. 5). From there, the Circuit Court launched into a discussion of whether the advertising ban directly advances the state's asserted interest. The First Circuit placed the burden of proof directly on the party seeking suppression,

the State. *44 Liquormart, Inc. v. State of RI*, 39 F.3d at 7 (App. 5). The First Circuit found that the burden as articulated by the District Court was too strict – that perfection should not be the requirement, but only reasonableness. *44 Liquormart, Inc. v. State of RI*, 39 F.3d at 7 (App. 5). The First Circuit noted that the term "directly advances" is not an absolute, and discussed the fact that even plaintiff's expert offered some support for the State's argument. *44 Liquormart, Inc. v. State of RI*, 39 F.3d at 7 (App. 6). The Court also applied a reasonableness standard to the "not more extensive than necessary" prong of the *Central Hudson* test. *44 Liquormart, Inc. v. State of RI*, 39 F.3d at 7 (App. 6).

In discussing whether the challenged regulation was "not more extensive than necessary", the First Circuit held that there was "inherent merit in the State's contention that competitive price advertising would lower prices, and that with lower prices there would be more sales." *44 Liquormart, Inc. v. State of RI*, 39 F.3d at 7 (App. 7). Finally, the Circuit Court accepted the common sense theory that "[a]dvertising must be generally productive, or so much money would not be spent on it." *44 Liquormart, Inc. v. State of RI*, 39 F.3d at 8 (App. 7). The First Circuit Court of Appeals then stated that the Twenty-first Amendment *should* be considered in a commercial speech case involving regulation of alcoholic beverages. *44 Liquormart, Inc. v. State of RI*, 39 F.3d at 5 (App. 8). On October 24, 1994, judgment entered for the Respondents. (J.A. 26). Petitioners then applied to this Court, and on May 1, 1995, certiorari was granted.

SUMMARY OF ARGUMENT

Rhode Island may, consistent with the First Amendment, prohibit truthful, non-misleading price advertising regarding alcoholic beverages, if it is shown that the regulation directly advances the governmental interest asserted, and if it is not more extensive than is necessary to serve that interest. The record clearly establishes that the price advertising ban has a direct effect on the State's asserted interest of promoting temperance and that there is a "reasonable fit" between the promotion of temperance and the ban.[5]

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[5] The determination of this issue will impact on a variety of restrictions on alcoholic beverage advertising. See, e.g., Ark. Alco. Bev. Cont. Div. Reg. § 3.17 (1991) reprinted in Liquor Cont. L. Rep. (CCH) [Ark.] ¶4217 at 7247 (1994) (prohibiting advertising of discount sales); Conn. Dep't of Liquor Const. Regs § 30-6-A40 (1976) reprinted in Liquor Cont. L. Rep. (CCH) [Ga.] ¶4158 at 13,244 (prohibiting price advertising by "off-premise" licensees except within the establishment); Kan. Stat. Ann. ¶41-714(2) (1991) reprinted in Liquor Cont. L. Rep. (CCH) [Minn.] ¶4038(2) at 25,222 (banning price advertising except in windows and premises of licensed establishments); Mo. Div. of Liquor Cont. Regs. § 11 CSR 7 – 2.240(18) (1986) reprinted in Liquor Cont. L. Rep. (CCH) [Mo.] ¶4142G(18) at 27,232 (prohibiting manufacturers and wholesalers from price advertising); N.H. Rev. Stat. Ann. § 179:51 (1992) reprinted in Liquor Cont. L. Rep. (CCH) [N.H.] ¶7251 at 31,429-30 (prohibiting listing of retail prices by a wholesaler on behalf of a distributor); N.C. Admin. Code tit. 4, r. 2R1008(c)(2) (1984) reprinted in Liquor Cont. L. Rep. (CCH) [N.C.] ¶4448(c)(2) at 35,254 (prohibiting "on-premise" licensees from advertising the brand name of any alcohol beverage); Ohio Rev. Code Ann. § 4301.211 (Anderson 1989) reprinted in Liquor Cont. L. Rep. (CCH) [Ohio] ¶7172A at 37, 419 (prohibiting price advertising for malt beverages except within the licensed establishment); Section 4-4-498(a) of the

The testimony and evidence outlined above clearly supports the State's argument that the price advertising ban directly and materially promotes temperance. Testimony from both sides indicated that the price of alcoholic beverages in the State of Rhode Island would go down if the price ban were lifted. (J.A. 70-71, 73-74, 84). Further, the restriction could be no more narrowly tailored. As discussed *infra*, perfection is not the requirement, only reasonableness. Further, recent decisions of this Court lead to the conclusion that as long as a sufficient record has been established and the restrictions are not confusing or irrational, they will be upheld. *Rubin v. Coors*, 115 S.Ct. 1585 (1995); *Florida Bar v. Went-For-It, Inc. and John T. Blakely*, No. 94-226, June 21, 1995.

Finally, the State believes and argues herein that both the intent behind the Twenty-first Amendment, its application and decisions of this Court mandate that it be considered in weighing the interests of the parties herein.

Pennsylvania Liquor Code, Pa. Stat. Ann. tit. 47, § 4-498(a) (1969 and Supp. 1994) (prohibition on price advertising) S.C. Alco. Bev. Cont. Comm'n § 7-34 (1991) reprinted in Liquor Cont. L. Rep. (CCH) [S.C.] ¶4034 at 42,212 (prohibiting retailers from price advertising). This list is by no means exhaustive. Nearly every state restricts alcoholic beverages in one form or another.

ARGUMENT

A. A Decision Upholding Rhode Island's Alcohol Advertising Ban Would Be Consistent With Recent Decisions of This Court.

The case of *Rubin v. Coors*, 115 S.Ct. 1585 (1995), must be distinguished at this point. In that case, a section of the Federal Alcohol Administration Act (hereinafter "FAAA") which prohibited beer labels from displaying alcohol content was held to violate the First Amendment's limited protection of commercial speech.[6] This Court held that the labeling ban failed the *Central Hudson* four part test since it was not shown that it advanced the government's interest in a direct and material way. At the outset, the State of Rhode Island proffers that *Rubin* can be distinguished from the instant matter in four important respects: (1) *Rubin* involved federal regulation and did not implicate powers reserved to the states under the Twenty-first Amendment; (2) the State of Rhode Island does not have a confusing statutory scheme as was involved in *Rubin*; (3) the information in the case *sub judice* is not about a quality of the product itself; and (4)

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[6] It is interesting to note that initially, not only was the labeling ban of the FAAA attacked as unconstitutional, but also the ban on advertising the strength of alcoholic beverages. That advertising restriction was upheld by the District Court and was not appealed. *See, Adolph Coors Company v. Bentsen*, 2 F.3d 355, 357 (10th Cir. 1993) and *Rubin, supra*. Apparently, the tenth circuit was satisfied that the continuing threat of strength wars justified a prohibition on statements of alcohol content in advertising, but regarded labeling as different because it believed statements of alcohol content on labels would be used by consumers primarily to *limit* their intake of alcohol.

there is abundant record evidence to support Rhode Island's advertising ban.

Rubin involved a First Amendment attack on § 205(e)(2) of the FAAA which prohibited the selling, shipping or delivering in interstate or foreign commerce any malt beverages, distilled spirits, or wines in bottles

> unless such products are bottled, packaged and labeled in conformity with such regulations, to be prescribed by the Secretary of the Treasury, with respect to packaging, marking, branding, and labeling and size and fill of container . . . as will provide the consumer with adequate information as to the identity and quality of the products, the alcoholic content thereof (except that statements of, or statements likely to be considered as statements of, alcoholic content of malt beverages are prohibited unless required by State law and except that, in case of wines, statements of alcoholic content shall be required only for wines containing more than 14 per centum of alcohol by volume), the net contents of the package and the manufacturer or bottler or importer of the product.

27 U.S.C § 205(e)(2). At the outset, it must be noted that the FAAA provisions mandated both disclosure *and* censorship, creating a confusing and irrational framework. In addition, also involved were certain implementing regulations promulgated by the Bureau of Alcohol, Tobacco & Firearms (hereinafter "BATF") under delegation of authority from the Secretary of the Treasury which prohibited the disclosure of alcohol content on beer labels. 27 CFR § 7.26(a) (1994). Supplementing the prohibition on numerical indications of alcohol content, the BATF

adopted labeling regulations proscribing descriptive terms suggesting high alcohol content. The BATF regulations did not prohibit labels from identifying beer as having reduced or no alcohol. Thus, another confusing discrepancy was created by the regulations. Further, by statute and by regulation, the labeling ban involved in *Rubin* was required to give way if a state law required disclosure of alcohol content. In contrast to the "overall irrationality" of the FAAA's labeling ban/requirement, *Rubin*, 115 S.Ct. at 1592, the Rhode Island ban is clear, precise and applicable in all instances in the same manner. Neither the media, nor a wholesaler, retailer or licensee may advertise the price of an alcoholic beverage or refer *in any way* to price. R.I. Gen. Laws § 3-8-7, 3-8-8.1, Regulation 32.

In *Rubin*, the government's asserted interest was the prevention of "strength wars". This Court agreed that the government had a significant interest in protecting the health, safety, and welfare of its citizens by preventing brewers from competing on the basis of alcohol strength, which could lead to greater alcoholism and its attendant social costs. 115 S.Ct. at 1591. "[W]e have no reason to think that strength wars, if they were to occur, would not produce the type of social harm that the government hopes to prevent". 115 S.Ct. at 1591.

The government attempted to bolster its position by using the power of the Twenty-first Amendment to bootstrap the strength war argument onto an asserted governmental interest of preserving state authority and state power pursuant to the Twenty-first Amendment. The federal government obviously knew that it did not have the benefit of the Twenty-first Amendment and attempted to

take advantage of its powers in this roundabout manner. In rejecting this argument, this Court held that the government had offered nothing that suggests the states are in need of federal assistance. "States clearly possess ample authority to ban the disclosure of alcohol content-subject, of course, to the same First Amendment restrictions that apply to the federal government." 115 S.Ct. at 1591. This Court impliedly affirmed the State's power under the Twenty-first Amendment when it stated "One State's decision to permit brewers to disclose alcohol content on beer labels will not preclude neighboring states from effectively banning such disclosure of that information within their borders".[7] *Id.*

Another problem the respondents had in *Rubin* was the fact that the information sought to be disclosed on the label was information concerning the product itself, i.e., the alcohol content of the beverage. *Id.* at 1589. In this case, the information banned from distribution by Rhode Island's statutory scheme is not information concerning the product itself, rather, it concerns only the price at which such commodity is offered for sale. This is a critical distinction and, standing alone, would be enough of a distinction from *Rubin* to dilute its applicability in the present case. Further, the justification in *Rubin* i.e., that strength wars would have the frightening results predicted, was undermined by the fact that during the passage of time between the enactment of the FAAA and the present, technology has made distillers better able to

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[7] This holding would appear to foreclose Petitioner's argument that Rhode Island may not ban ads from Massachusetts retailers. (Petitioner's Brief 24-26).

place a more accurate description of the alcohol content on their labels. When the FAAA was passed, false, misleading and deceptive alcohol percentages abounded, because of the inability of the industry to accurately gauge the amount of alcohol in a given beverage. Today, modern scientific technology makes it possible for distillers to place more accurate information on the label. This distinction is lacking in the present case.

In *Florida Bar v. Went-For-It, Inc. and John T. Blakely*, No. 94-226, June 21, 1995, this Court upheld against a First Amendment challenge certain advertising restrictions upon attorneys in the State of Florida, noting that First Amendment protection of commercial speech is of recent vintage and is not absolute.

> We have always been careful to distinguish commercial speech from speech at the First Amendment's core. '[C]ommercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values' and is subject to 'modes of regulation that might be impermissible in the realm of noncommercial expression'.

Id., quoting *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469, 477 (1989), quoting *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 456 (1978). In applying the four part *Central Hudson* test, this Court found that protecting the image of the bar and the justice system generally, was a substantial governmental interest and that a restriction on direct solicitation of accident victims and their families for 30 days following an accident advanced that interest in a direct and material way and was not more restrictive than necessary. The Florida case

had an extensive record to support the solicitation ban. The Florida Bar submitted a 106 page summary of a two year study of lawyer advertising and solicitation to the Federal District Court. This Court noted that the record as presented by the Bar was noteworthy for its breadth and detail. *Florida Bar*, No. 94-226, *slip op.* at 9. In discussing how extensive a record must be to support a First Amendment restriction, this Court stated:

> In any event, we do not read our case law to require that empirical data come to us accompanied by a surfeit of background information. Indeed, in other First Amendment contexts, we have permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether, or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus and 'simple common sense'. Nothing in *Edenfield, supra*, a case in which the State offered no evidence or anecdotes in support of its restriction, requires more.

(Citations omitted). *Id.*, slip op. at 10.

Moving on to the fourth prong of *Central Hudson*, this Court discarded the notion that the "least restrictive means" test is applicable in a commercial speech context. This Court reiterated instead that the test as set forth in *Fox*, 492 U.S. at 480, is a "fit" between the legislature's ends and the means chosen to accomplish those ends. In upholding the Florida Bar's restriction, this Court found that it was "reasonably well tailored to its stated objective. . . . " *Id.*, slip op. at 15. This Court noted that there were other means that Floridians could utilize to obtain an attorney within 30 days of an accident. Likewise, in

the State of Rhode Island, a potential purchaser of alcoholic beverages might decide to purchase before they enter a store and there obtain their price information. Rhode Islander consumers are likewise free to conduct their own comparison shopping by telephoning retail outlets for price information.

The State of Rhode Island submits that the following commentary is equally applicable to the case at bar:

> This case, however, concerns pure commercial advertising, for which we have always reserved a lesser degree of protection under the First Amendment. Particularly because [the object of regulation has] traditionally been subject to extensive regulation by the States, it is all the more appropriate that we limit our scrutiny of state regulations to a level commensurate with the 'subordinate position' of commercial speech in the scale of First Amendment values.

Florida Bar, slip op. at 17, quoting *Fox*, 492 U.S. at 477, quoting *Ohralik*, 436 U.S. at 456. Because price advertising is the most commercial and least informative speech concerning a product, price advertising should be afforded the least amount of protection in the entire spectrum of First Amendment values. Since the protection available for a particular commercial expression turns on the nature of both of the expression and of the governmental interest served by its regulation, *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983), therefore, a decision upholding Rhode Island's advertising ban is a logical extension of *Rubin* and *Florida Bar*.

B. With or Without the Twenty-first Amendment, the State Proved That The Price Advertising Ban Directly and Materially Advanced Its Asserted Interest and That It Was No More Extensive Than Necessary.

Speech proposing a commercial transaction is entitled to lesser protection than other constitutionally guaranteed expression. *Ohralik*, 436 U.S. at 455-456. This lesser degree of protection is appropriate for expression related solely to the economic interests of the speaker and its audience. *Central Hudson*, 447 U.S. at 561. The commercial aspect of a message may provide a justification for regulation that is not present when the communication has no commercial character. *Ohralik*, 366 U.S. at 455-456. This is because commercial speech, unlike other varieties of speech, occurs in an area traditionally subject to governmental regulation. *Id.* In *Florida Bar*, this Court articulated an intermediate scrutiny test for commercial speech. "Unlike rational basis review, the *Central Hudson* standard does not permit [this Court] to supplant the precise interests put forward by the State with other suppositions," *Id.* slip op. at 5, citing *Edenfield v. Fain*, 113 S.Ct. 1792 (1993).

A lot has been said about the supposed secret agenda of the State in protecting small retailers from competition. (Petitioner's brief p. 24). The purpose of the price advertising ban and of the entire alcoholic beverage regulatory scheme in Rhode Island is set out in R.I. Gen. Laws § 3-1-5. The stated purpose is "the promotion of temperance and for the reasonable control of the traffic in alcoholic beverages". Petitioners presented no evidence to support their hypothesis. Therefore, the promotion of temperance is the stated purpose, and the only purpose,

which this Court should consider in determining whether the price advertising ban is constitutional.[8]

It is permissible, even necessary, to consider the type of commercial transaction and the commodity involved when determining whether a restraint on commercial speech is valid under the *Central Hudson* test. Commercial speech is "linked inextricably" with the commercial transaction it proposes, so the State's interest in regulating the underlying transaction may give it a concomitant interest in the expression itself. *Edenfield*, 113 S.Ct. at 1798. It is therefore permissible for the State and for this Court to distinguish between transactions involving alcoholic beverages and transactions involving any other commodity. The State is not required to put blinders on when regulating an industry and the State is free to consider the harmful societal effects of a commodity in its regulation.

This is *not* the first time the constitutionality of restrictions on price advertising for alcoholic beverages has come before this Court. In *Queensgate Investment Company v. Liquor Control Comm'n*, 69 Ohio St. 361, 433 N.E. 2d 138 (1982), appeal dismissed, 459 U.S. 807, Ohio's price advertising ban was attacked on First Amendment grounds. In that case, Queensgate Investment Company (hereinafter "Queensgate") was the holder of an Ohio

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[8] Petitioners would have this Court believe that an insidious plot has been developed by the State of Rhode Island to protect small liquor stores from competition by big giant retail outlets. The intervenor obviously did not share Petitioner's belief that the State was protecting their interests. Why else would they have intervened?

liquor permit and was prosecuted for violating regulations of the Ohio Liquor Control Commission which prohibited off-premises price advertising of alcoholic beverages, the exact prohibition found in Rhode Island's challenged laws. After being found in violation of the above regulations, Queensgate appealed to the Ohio Supreme Court, and argued that the price advertising ban violated its First Amendment guarantee of freedom of speech.

In determining that the price ban did *not* violate the First Amendment, the Ohio Supreme Court applied the four part *Central Hudson* test. The *Queensgate* court came to the logical conclusion that the advertising of drink prices and price advantages would encourage and stimulate excessive consumption of alcoholic beverages. It determined that no less extensive a regulation would achieve the same purpose. "Rather, in order to serve the same governmental interest, virtually any other regulation would be more extensive; *e.g.*, increased prices, shorter hours or reduced number of permits, would all place a greater burden on the permit holder." *Queensgate*, 433 N.E.2d at 141-142.

Queensgate then appealed to this Court. The Ohio Liquor Control Commission filed a Motion to Dismiss the appeal for want of substantial federal question. This Court agreed with the Liquor Control Commission, and dismissed the case on that ground.

The First Circuit in the case *sub judice* discussed the effect of *Queensgate*, noting that there was no relevant factual distinction, and held that "with *Queensgate* or without, plaintiff 44 Liquormart must lose". 39 F.3d at 8

(Pet.App. 9). Recognition of the precedential effect of *Queensgate* would mandate affirmance of the First Circuit.

The issue in *Queensgate* and in the present dispute is identical, *i.e.*, whether a ban on advertising the price of alcoholic beverages violates the First Amendment's guarantee of free speech. The Ohio court used the four-part *Central Hudson* test, and when this decision and its reasoning were before this Court on appeal, it was held that no federal question was involved. This decision, while short, is nonetheless a decision on the merits, affirming a finding that no First Amendment rights were implicated by the price advertising ban.

1. Rhode Island's Price Advertising Ban Directly Advances Its Asserted Interest of Promoting Temperance and Controlling The Traffic in Alcoholic Beverages.

Pursuant to *Central Hudson*, the State must demonstrate that the challenged regulation "advances the government's interest 'in a direct and material way' ". *Rubin*, 115 S.Ct. at 1588; quoting *Edenfield*, 113 S.Ct. at 1798. Courts have recognized as a matter of common sense that a restriction on the advertising of a product decreases demand for that product. See *United States v. Edge Broadcasting*, 113 S.Ct. at 2696, 2707 (1993); *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico*, 478 U.S. 328, 342 (1986); *Central Hudson*, 447 U.S. at 569; *Cal-Almond, Inc. v. U.S. Dept. of Agriculture*, 14 F.2d 429 (9th Cir. 1993).

In *Edge Broadcasting*, this Court cautioned that the question of whether the regulation directly advances the

governmental interest asserted cannot be answered by limiting the inquiry to whether the governmental interest is directly advanced as applied to a single person or entity. Rather, there must be a consideration of the "fit" between the legislature's ends and the means chosen to accomplish those ends. 113 S.Ct. at 2705. In *Edge Broadcasting*, this Court found that the interest was served as applied to *all* radio and television stations, even though if, as applied only to Edge, there was only marginal advancement of that interest. *Id.* Since in this case it is undisputed that – even as to Petitioners – the effect of the ban is substantial (upwards of $100,000 *per store per year*) (J.A. 47), the total effect when all licensed liquor retailers are considered is staggering.

In both *Edenfield* and *Rubin*, advertising restrictions were struck down in large part because there was not an adequate factual record presented to support the advertising ban. *Edenfield*, 113 S.Ct. at 1800; *Rubin*, 115 S.Ct. at 1591. The State submits that, in this case, the record below supports the Rhode Island's advertising ban. The direct effect that Rhode Island's ban has on the promotion of temperance is as follows – the advertising ban increases the cost of alcoholic beverages and therefore decreases their consumption in two ways: (1) increasing "search time" to obtain the best price of alcoholic beverages;[9] and (2) without competition, the real price of the beverage will remain higher than without advertising.

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[9] The gravamen of the testimony and evidence presented on the issue of "search time" was that a consumer's time spent searching for the best deal is worth something. This cost should be included in determining the cost of the item to the consumer.

Therefore the State submits not one, but two ways that the advertising ban directly and materially affects the price of alcoholic beverages and therefore promotes temperance.

At this juncture, it must be noted that the area of alcohol consumption and the effect of advertising thereon is a difficult topic to research. This point was conceded by all experts below. This is in large part due to the fact that the cumulative effects of advertising are difficult to assess. (Testimony of Dr. Smart J.A. 79, 80). Further, no state may determine with absolute certainty the amount of alcohol its citizens consume within their homes, in restaurants, bars and nightclubs. The level of consumption may only be gauged by the amount of alcohol purchased. Simply because the topic is a difficult one to research should not, however, mean that alcoholic beverages may not be regulated.

In support of its case, the State offered the testimony of Dr. Henry Saffer, an economist. Dr. Saffer testified that economists look at the price of alcoholic beverages as having two parts. One, the search time; and two, the actual money price. Price information allows a consumer to find lower product prices more easily, thus lowering the average price for alcohol. He also set forth a third direct effect advertising has on the price of alcohol in that there would be a greater variance when price advertising is not allowed than when it is allowed. This gives the consumer an incentive to look around, thus increasing the search time and creating a more knowledgeable group of consumers. (J.A. 69, 70). Dr. Saffer testified that if the ban were abolished, the result would be lower prices and increased consumption. This opinion was based upon the

fact that if the ban on price advertising were removed, then the average price would go down and people could more easily find lower prices. (J.A. 71).

Dr. Reginald Smart, a registered psychologist and scientist, testified on behalf of the Petitioners. Dr. Smart admitted that although he believed alcohol advertising and consumption were not linked, that there were some research experts who believed – based upon studies – that alcohol advertising led to overall increased consumption. (J.A. 76). He acknowledged that there were generally two camps on the issue of the effect of alcohol advertising upon consumption – those in the advertising and alcohol beverage industry who refuse to see a link and those in consumer groups, government and some research experts who believe that there is a connection (J.A. 76).[10] Dr. Smart was the author of an article that was discussed during his testimony. His article acknowledged no less than twelve differing opinions on the effect of advertising on the sale and consumption of alcoholic beverages (J.A. 81). One of those positions is that of the Board of Trustees of the American Medical Association, which takes the position that alcohol advertising does appear to influence excessive, hazardous and problem drinking. (J.A. 77). Also in his article, Dr. Smart discusses the opinion of the noted economist, John Kenneth Galbraith, who in 1958, wrote that advertising affects *both*

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[10] This division is present in this case. Amici in support of the Petitioners represent three distinct groups: advertisers, the media and the liquor industry, who share one common denominator – financial gain through the advertising of alcoholic beverages. The State of Rhode Island stands to realize no economic gain from this case.

brand preference *and* the aggregate level of consumption. (J.A. 78). Dr. Smart himself has noted that a lot of the marketing of alcoholic beverages is aimed at specific segments of the market, such as youth, women and blacks. (J.A. 78). He also notes that leaders in the alcohol industry take the position that "without growth we cannot survive". (J.A. 78). He also, from his own research, acknowledges that although beverage manufacturers claim that they wish only to increase their share of the market, total profits will increase if the market expands and the shares remain the same. (J.A. 79).

Of most importance to the case is Dr. Smart's testimony that price is a potent influence on the level of alcohol consumption. (J.A. 79, 80, 81). He agrees with Dr. Saffer, the State's expert, that the cost of a commodity should include the search cost in obtaining that good. (J.A. 79). He also agrees that advertising has cumulative effects that are difficult to detect because the influence of one advertisement is likely to be insignificant, but that the impact of thousands or hundreds of thousands of advertisements over the course of years and over the course of someone's life is difficult to assess. (J.A. 79, 80). Dr. Smart finds the statement that "a ban on price advertising raises the mean and variance of price by increasing search costs and this results in lower consumption" to be a reasonable expectation. (J.A. 80).

In discussing the phenomenon known as "happy hour", where a restaurant or bar serves reduced price drinks for a short period, Dr. Smart acknowledges that there is a "negative relationship" between alcohol consumption and price. He defined that term as follows: as prices go up, alcohol consumption comes down and,

inversely, as prices go down, consumption increases. (J.A. 81). Dr. Smart also acknowledged that consumers will travel to purchase alcohol if they think they will save some money. (J.A. 81).

Petitioner's other expert, Dr. David J. Pittman, a Professor of Psychology, also bolstered the State's argument that price advertising has a direct effect on consumption. He stated that he was aware of *no empirical evidence* that would refute the conclusion that banning alcohol price advertising promotes temperance. (J.A. 83). He testified that price advertising leads to lower costs for the consumer for the product being advertised. (J.A. 84).[11] It was his opinion that if Rhode Island alcohol price advertising ban were to be repealed, lower alcohol price would be a ***direct effect***. (J.A. 84). Therefore, Petitioner's own experts have made the State's case by testifying that the advertising ban has a *direct effect* on the price of alcoholic beverages. They also provided testimony that price is an important determinant in consumption.

At trial, the State submitted research results which concluded that price advertising does have a direct result on alcohol consumption. Stanley I. Ornstein and Dominique M. Hanssens, *Alcohol Control Laws and the Consumption of Distilled Spirits and Beer*, 12 J. Consumer Res. 200 (Sept. 1985). (J.A. 94-121). Ornstein and Hanssens found

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[11] This Court has recognized the connection between advertising and price: " . . . where consumers have the benefit of price advertising, retail prices often are dramatically lower than they would be without price advertising. *Bates v. State Bar of Arizona*, 433 U.S. 350, 377 (1977) (citations omitted).

that the absence of price advertising will increase consumer search costs, raising the mean and variance of prices and *reducing consumption*. Conversely, in states where price advertising is allowed, price should be lower and consumption greater. This indicates a positive relationship between price advertising and per capita consumption. (J.A. 108-109). This finding that price advertising leads to lower price and higher consumption (J.A. 114) was deemed to be reasonable *even by Petitioners' experts*. (J.A. 80, 84). In discussing the many regulatory options available, Ornstein and Hanssens found that

> Price intervention through tax increases, resale price maintenance, or bans on price advertising will have a much larger effect on spirits consumption than on beer consumption. The history of state excise taxes shows that they are rarely changed, except at times of budgetary crises. Resale price maintenance in alcohol has been on the decline for years and is fast disappearing in light of recent legal rulings. (Citing *California Retail Liquor Dealers Assn. v. MidCal Aluminum Inc., et al.*, 445 U.S. 97 (1980)). But advertising bans are increasingly being called for. Ten states proposed legislation to ban advertising in 1983, and a variety of public interest groups called on the Federal Trade Commission to restrict the advertising of alcoholic beverages. **A ban on price advertising raises the mean and variance of price by increasing search costs, and this results in lower consumption** (Ornstein and Hanssens 1984).

(J.A. 120). (Emphasis supplied).

While the Petitioners would have this Court believe that "expenditures on alcoholic beverage advertising

have been steadily increasing, while consumption has been steadily decreasing . . . " (Petitioners' Brief, p. 19), a recent study has found quite the opposite – that since the mid-1980's, alcohol advertising has decreased, accompanied by dramatic reductions in alcohol consumption and alcohol-related problems. George A. Hacker and Laura Anne Stuart, *DOUBLE DIP, The Simultaneous Decline of Alcohol Advertising and Alcohol Problems in the United States*, Center for Science in the Public Interest (June 1995).

Among the findings of Hacker and Stuart are that cutbacks in alcohol advertising expenses between 1986 and 1993 have been matched by substantial reductions in alcohol-related vehicle crash deaths. *Id.* at 13. These improvements have accompanied steady decreases in the rate of binge and daily drinking among high school seniors. *Id.* at 13. While the authors acknowledge that many factors play a part in the decline in alcohol-related problems, they state: "It is impossible to know the extent to which reductions in alcohol advertising helped lower drinking rates and foster health and safety benefits. However, the reduction of highly visible, repetitive, seductive appeals to drink is almost certainly part of the equation." *Id.* at 14.

Therefore, it is clear the District Court had before it substantial evidence – some of it from the Petitioner's own experts that the price advertising ban increases the price of alcoholic beverages, thus resulting in decreased consumption. The link has been forged and the record below amply demonstrates that the price advertising ban directly and materially affects the State's asserted interest, i.e., the promotion of temperance.

2. Rhode Island's Price Advertising Ban Is No More Extensive Than Necessary.

Petitioners would have this Court find that the statutes at issue go further than necessary to accomplish the stated purpose.[12] This Court has ruled that a prohibition of commercial speech requires a " 'fit' between the legislature's ends and the means chosen to accomplish those ends – a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition, but one whose scope is 'in proportion to the interests served' ". *Fox*, 492 U.S. at 480. The *Central Hudson* test is not so rigid as Petitioners would lead this Court to believe, rather, it is "flexible". *Fox*, 492 U.S. at 477. The interest to be served by the statutes under attack is the promotion of temperance and the reasonable control of the traffic in alcoholic beverages. R.I. Gen. Laws § 3-1-5. Prohibiting disclosure of the price of an alcoholic beverage or price advantage is certainly a reasonable and narrowly tailored means to that end. The restriction does not prohibit all alcoholic beverage advertising. Rather, only one tidbit of information is prohibited – price. Price advertising is allowed inside the licensed premises, to assist those who have *already decided* to purchase. The mere fact that Petitioners believe that there are other alternatives is not determinative.

In applying the standard enunciated in *Fox, supra*, to the case at bar, it is undeniable that Rhode Island's ban on price advertising is not more extensive than necessary.

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[12] This, despite the observation of this Court that almost all restrictions disallowed under *Central Hudson's* fourth prong have been "substantially excessive." *Fox*, 492 U.S. at 479.

This Court in *Fox* refused to adopt a "least restrictive means" test. 492 U.S. at 476. Since, in a commercial speech case, modes of regulation that might be impermissible in the realm of noncommercial expression are allowed, the least restrictive means requirement cannot be justified. *Fox*, 492 U.S. at 477. Even in core political speech cases, this Court has declined to impose a least restrictive means test, instead upholding restrictions on such speech so long as the restrictions are narrowly tailored to serve a significant governmental interest. *Fox*, 492 U.S. at 477, 478. This standard for commercial speech does not require elimination of all less restrictive alternatives, as argued by Petitioners. *Id.* This Court has never required a showing that there is no conceivable alternative, but only that the regulation not burden substantially more speech than is necessary to further the government's legitimate interests. This Court is "loath to secondguess" the legislature's judgment to that effect. *Id.* It is up to the legislature to decide as long as its judgment is reasonable. *Id.* at 479.

> In sum, while we have insisted that 'the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing . . . the harmless from the harmful,' we have not gone so far as to impose upon them the burden of demonstrating that the distinguishment is 100% complete, or that the manner of restriction is absolutely the least severe that will achieve the desired end. What our decisions require is a ' "fit" between the legislature's ends and the means chosen to accomplish those ends,' – a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but

> one whose scope is 'in proportion to the interest served,' that employs not necessarily the least restrictive means but, as we have put it in the other contexts discussed above, a means narrowly tailored to achieve the desired objective. Within those bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed. (citations omitted).

Fox, 492 U.S. at 480.

In *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), this Court upheld a time, place, and manner restriction that required a city to control the sound level of musical concerts in a city park – a regulation of *fully protected speech*. In rejecting the least restrictive means argument, this Court stated

> The Court of Appeals erred in sifting through all the available or imagined alternative means of regulating sound volume in order to determine whether the city's solution was "the least intrusive means" of achieving the desired end. This "less-restrictive-alternative analysis . . . has never been a part of the inquiry into the validity of a time, place, and manner regulation." * * * Instead, our cases quite clearly hold that restrictions on the time, place, or manner of protected speech are not invalid "simply because there is some imaginable alternative that might be less burdensome on speech."

491 U.S. at 797 (citations omitted).

This Court and other courts have repeatedly upheld reasonable restrictions on the advertising of activities that society deems harmful but has chosen for various reasons

to tolerate. See *Edge Broadcasting* (1993) (lotteries); *Posadas* (casino gambling); *Queensgate Investment Co.* (liquor price advertising); *Capital Broadcasting Co. v. Mitchell*, 333 F.Supp. 582 (D.D.C. 1971) (broadcast cigarette advertising); *Dunagin v. City of Oxford*, 718 F.2d 738 (5th Cir. 1983) (liquor advertising); *Oklahoma Telecasters* (prohibition of all alcohol advertising except for one storefront sign); *S & S Liquor Mart Inc.* (alcohol price advertising); *Rhode Island Liquor Stores Ass'n* (alcohol price advertising); *Princess Sea Indus., Inc. v. State of Nevada*, 635 P.2d 281 (Nev. 1981) (brothel advertising). These decisions indicate that legislatures are entitled to especially broad latitude in regulating speech that promotes activities that the legislatures reasonably determine give rise to especially great social harms.

Greater deference to legislative judgment with regard to socially harmful activities is justified by the rationale underlying this Court's commercial speech doctrine. As a general matter, commercial speech enjoys only "a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values." *Fox*, 492 U.S. at 477 (quoting *Ohralik*, 436 U.S. at 456); see *Edge Broadcasting*, 113 S. Ct. at 2703; *Central Hudson*, 447 U.S. at 563. That is because commercial speech "is 'linked inextricably' with the commercial arrangement that it proposes," *Edenfield*, 113 S. Ct. at 1798 (quoting *Friedman v. Rogers*, 440 U.S. 1, 10 n.9 (1979)), and commercial activity is "an area traditionally subject to government regulation," *Edge Broadcasting*, 113 S.Ct. at 2703 (quoting *Ohralik*, 436 U.S. at 456). The government's greater interest in, and authority over, regulation of commercial activity gives it greater interest in, and authority over, regulation of "the expression itself", than it has with

respect to other forms of expression. *Edenfield*, 113 S. Ct. at 1798.

In *Edge Broadcasting*, this Court noted that the activity which was being touted by the advertising (gambling) did not involve any constitutionally protected right. Rather, it was a "vice" which could be banned altogether. 113 S.Ct. at 2703. In deferring to the legislature, this Court found that although the government could have protected its interests in other ways, the regulation was not more extensive than necessary. 113 S.Ct. at 2704-2705. "Within the bounds of the general protection provided by the Constitution to commercial speech, we allow room for legislative judgments." 113 S.Ct. at 2707. This Court does not require that a State "make progress on every front before it can make progress on any front". *Id.* The analogy was made between advertising for gambling and advertising for cigarettes, this Court noting that Congress has altogether banned the broadcast advertising of cigarettes, even though it could hardly have believed that this regulation would keep the public wholly ignorant of the availability of cigarettes. *Id.*

In order to determine whether Rhode Island's statutory ban comports with *Central Hudson*'s fourth prong, we must examine the relationship between the State's interests and the means chosen to serve them. *Fox*, 492 U.S. at 480. This Court has previously held:

> with respect to this prong, the differences between commercial speech and noncommercial speech are manifest. In *Fox*, we made clear that the 'least restrictive means' test has no role in the commercial speech contest. 'What our decisions require' instead, 'is a "fit" between the

> legislature's ends and the means chosen to accomplish those ends' a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served,' that employs not necessarily the least restrictive means but '. . . a means narrowly tailored to achieve the desired objective.' Of course, we do not equate this test with the less rigorous obstacles of rational basis review; . . . the existence of 'numerous and obvious less-burdensome alternatives to the restriction on commercial speech . . . is certainly a relevant consideration in determining whether the "fit" between ends and means is reasonable.'

Florida Bar, 115 S.Ct. 2371. In examining the restriction in *Florida Bar*, this Court found that the rule prohibiting solicitation of clients within 30 days of an accident was reasonably well tailored to its stated objective. This Court noted that there were many other ways for injured Floridians to learn about the availability of legal representation during those 30 days.

Likewise, here, consumers who are so inclined may go to their favorite liquor store and peruse the shelves to determine which brand of the alcoholic beverage of their choice they wish to buy, based upon brand preference and price. As in the *Florida Bar* case, nothing prohibits a Rhode Island consumer from telephoning various retail outlets or talking with their neighbors to determine which store has the best prices. Further, all information other than price is available to consumers via radio, television, newspaper, magazines, etc. Purchasers may learn from advertisements the location of a liquor store, its size, the brands sold, its inventory, any other items

they may sell, simply not price of alcoholic beverages. It is hard to imagine how the ban could be less restrictive.

Finally, in determining that the *Florida Bar* restriction was no more extensive than necessary, this Court recognized that the direct solicitation restriction and the attack thereon concerned pure commercial advertising for which a lesser degree of protection under the First Amendment has always been reserved. Particularly because the standards and conduct of state licensed lawyers had traditionally been subject to extensive regulation by the State of Florida, this Court felt that it was all the more appropriate that the level of scrutiny be commensurate with the subordinate position of commercial speech in the scale of First Amendment values. *Florida Bar*, slip op. at 17, *citing Fox*, 492 U.S. at 477, *quoting Ohralik, supra*, 436 U.S. at 456. Comparing the restriction in this case to that upheld in the *Florida Bar*, it is clear that the State of Rhode Island is entitled to and does regulate the alcoholic beverage industry extensively, just as the Florida Bar regulated the legal profession. Therefore, since in both cases the commercial speech restriction concerned an area traditionally subjected to intense state regulation, a restriction on advertising should be deemed allowable.

This Court's decision in *Posadas de Puerto Rico*, clearly states that the power to totally prohibit includes the power to regulate to a lesser degree.

> It would * * * surely be a strange constitutional doctrine which would concede to the legislature the authority to totally ban a product or activity, but deny to the legislature the authority to forbid the stimulation of demand for the product or activity through advertising on behalf of

> those who would profit from such increased demand. Legislative regulation of products or activities deemed harmful, such as cigarettes, alcoholic beverages, and prostitution, has varied from outright prohibition on the one hand * * * to legalization of the product or activity with restrictions on stimulation of its demand on the other hand * * * . To rule out the latter, intermediate kind of response would require more than we find in the First Amendment.

Posadas, 478 U.S. at 347-348 (citations omitted).

Petitioners would have this Court believe that all alternative forms of liquor control must be exhausted before the advertising restrictions could be utilized. This is simply contrary to all teachings of this Court, and the lower federal courts. As the First Circuit noted "[t]he State is entitled to a reasonable choice. This includes choice of method – it is not obliged to prove that some other method, e.g., taxation, would be less effective." *44 Liquor Mart v. State*, 39 F.3d at 7 (J.A. 6). The restriction cannot be challenged on the ground that price wars could be combatted just as effectively by increasing the State's sales tax. As this Court explained in a similar context, "it is up to the legislature to decide whether or not such a counterspeech policy would be as effective" as the advertising restriction. *Posadas*, 478 U.S. at 344. The fourth part of the *Central Hudson* test does not force the State to choose between differing methods of regulation. Rather, there is room for legislative judgment. See *Dunagin v. City of Oxford, Mississippi*, 718 F.2d 738 (5th Cir. 1983) (en banc), cert. denied, 467 U.S. 1259 (1984); *Fox*, 492 U.S. at

480; *Edge*, 113 S.Ct. at 2707; *Posadas*, 478 U.S. at 344; *Central Hudson*, 447 U.S. at 569.

C. The Twenty-first Amendment Should Be Considered in a Commercial Speech Case Involving the Regulation of Alcoholic Beverages.

Since its passage in 1933, the Twenty-first Amendment has been deemed to confer broad powers on the states in the area of liquor regulation. *California Retail Liquor Dealers Association v. MidCal Aluminum, Inc.*, 445 U.S. 97 (1980). However, as this Court has opined in *South Dakota v. Dole*, 483 U.S. 203 (1987), "its bounds have escaped precise definition". *Id.* at 206. A brief review of the history of the Twenty-first Amendment confirms the State's argument that states retain broad powers in the area of liquor regulation. As originally proposed, the Twenty-first Amendment had four articles. Section 1 repealed the Eighteenth Amendment, Section 2 mirrors that in place in the Amendment today, Section 3 gave Congress concurrent power to regulate or prohibit the sale of intoxicating liquors to be drunk on the premises where sold, and Section 4 provided the mechanism for adoption. 76 Cong. Rec. 4138-4139 (1933). Much of the argument surrounding the adoption of the Twenty-first Amendment concerned the method by which it should be ratified, i.e., by legislatures or by convention. However, when considering whether Sections 2 and 3 should both be included, Congress debated how much power should be retained by the states. During the debates, Senator Wagner from New York eloquently argued that the national government should:

> have confidence in your state governments. We have confidence in our state governments to deal with other and much more important subjects. We have confidence in our state governments to administer justice, to provide for the national defense, to provide for the education of their children, to protect their people against crime and criminals. All of these matters are now dealt with effectively and successfully by the state governments; and I say this matter of controlling the habits of people and regulating them is a local affair and in the province of state government, and the only way to deal with it successfully is to leave it to the conscience of the people of each state instead of attempting to set up a uniform standard for all of the people of the United States. Then, in my judgment, we will get laws which are in harmony with the conscience of the people, and which will on that account be supported and enforced.

76 Cong. Rec. 4146 (1933). In continuing this appeal for the removal of Section 3 from the Twenty-first Amendment, Senator Wagner argued:

> . . . I am fully satisfied that if we permit our government to function as it was intended to function, through the states, we shall find that the people of each of the 48 states will adopt those methods which will in accordance with local need and conditions, most effectively bring the liquor traffic under control and actually *promote temperance*.

76 Cong. Rec. 4147 (1933) (emphasis added).

This Court has a long history of recognizing the States' role in liquor regulation. This Court has stated

that the Twenty-first Amendment has given broad power to the states and generally they may delegate this power as they see fit. *City of Newport, Kentucky v. Iacobucci*, 479 U.S. 92 (1986). In *Larkin v. Grendels Den, Inc.*, 459 U.S. 116 (1982), a case dealing with the Establishment Clause, this Court stated: "Given the broad powers of the states under the Twenty-first Amendment, judicial deference . . . is especially appropriate in the area of liquor regulation." 459 U.S. 121, 122. Likewise, the Circuits have deferred to the States and recognized their broad power to regulate alcohol pursuant to the Twenty-first Amendment. *See, Actmedia, Inc. v. Stroh*, 830 F.2d 957 (9th Cir. 1986) (upholding "tied-house" statute in the face of a First Amendment challenge); *Dunagin v. City of Oxford, Mississippi*, 718 F.2d 738 (5th Cir. 1983) (holding that if there is any instance where a state can escape First Amendment constraint while prohibiting truthful advertising promoting lawful sales, it would be where the product being sold is intoxicating liquor); *Olitsky v. O'Malley*, 597 F.2d 295 (1st Cir. 1979) (consideration of any State law regulating intoxicating beverages must begin with the Twenty-first Amendment).

In *Dunagin*, the Fifth Circuit had the opportunity to review the constitutionality of Mississippi's near total ban on alcoholic beverage advertising. The challengers to the ban argued that it violated the First Amendment. In disagreeing, the Fifth Circuit articulated what has come to be known as the "vice" argument. The *Dunagin* Court stated "[i]f there is any instance where a state can escape First Amendment constraint while prohibiting truthful advertising promoting lawful sales, it would be where the product being sold is intoxicating liquor". 718 F.2d at 743.

The Fifth Circuit noted that Section 2 of the Twenty-first Amendment:

> is unique in the constitutional scheme in that it represents the only express grant of power to the states, thereby creating a fundamental restructuring of the constitutional scheme as it relates to one product-intoxicating liquors. (citation omitted).

718 F.2d at 744.

In delineating the test to be used when considering alcohol advertising restrictions, the Fifth Circuit asserted that any analysis of the validity of a state statute regulating liquor does not proceed via the traditional route for testing the constitutionality of state statutes. The Court determined that it should proceed from a vantage point of "presumed state power and then ask whether there are any limitations to that power, always keeping in mind that where intoxicating liquors are concerned, great deference must be accorded a comprehensive state regulatory scheme". 718 F.2d at 744.

This long line of cases granting the states near absolute power to regulate the liquor industry is based upon society's knowledge of alcohol and its effects. The Eighteenth Amendment was passed in response to problems dealing with alcoholic beverages. When debating whether to repeal that amendment, it was suggested that "liquor has never known how to obey the law". 76 Cong. Rec. 4167 (1933). The position of the Petitioners herein continue the evolution of a consistent attempt by the alcoholic beverage industry to chip away the area of states' rights when dealing with alcoholic beverages.

Before adoption of the Twenty-first Amendment, one Senator argued: "I want to recall how in every conceivable way some of those engaged in the manufacture and sale of intoxicating liquors sought to break down and destroy these principles and to rob the people in their respects to states of their protection." 76 Cong. Rec. 4170 (1933). In questioning the motives of the alcoholic beverage industry and its lobbying groups to return power to the states it was argued that "all the time those who are now asking us to turn back to the states the control of the liquor traffic were seeking to break down the power of the states to control the liquor traffic". 76 Cong. Rec. 4171 (1933). Immediately prior to voting on the exclusion of Section 3, Senator Borah of Idaho made the following statement:

> I venture the opinion, and it is my belief, that the Eighteenth Amendment would never have been adopted had it not been for the open, brazen, corrupt, persistent defiance of the laws of the dry states by the liquor interests outside those states. At the time the Eighteenth Amendment was adopted, 33 states had prohibition in some form. The people had declared they wanted to be rid of this evil, or at least to control it in their own way. These states were invaded, their laws broken, their officials corrupted, by the same influences which now plead for states' rights and local control. They did not at that time respect that right at all. They trampled upon it and scoffed at it. Therefore, if we are to have what we are now promised, local self government, state rights, the right of the people of the respective states to adopt and enjoy their own policies, we must have some

> other method, some other provisions of the constitution, than those which existed prior to the adoption of the Eighteenth Amendment.

76 Cong. Rec. 4172 (1933).

Therefore, the State urges this Court to carefully consider the wealth of case law and jurisprudence which has afforded the States wide latitude in the area of alcohol regulation and the regulation of alcohol advertising based upon the Twenty-first Amendment. Consistent with the specific language of the Twenty-first Amendment and with the plainly expressed congressional intent, this Court should affirm Rhode Island's right to regulate price advertising of alcoholic beverages, and affirm the decision of the First Circuit.

CONCLUSION

The State of Rhode Island has met the four-part *Central Hudson* test, regardless of whether the Twenty-first Amendment is considered. However, the State urges this Court to reaffirm State's power under the Twenty-first Amendment, and find the following commentary instructive.

> Beverage alcohol, America's drug of choice, imposes enormous economic, health and social costs on the nation each year. Excessive drinking results in deaths on the highway; broken homes; abused spouses and children; increased spread of sexually transmitted diseases, including HIV; violent crime and rape; alcohol dependence; and

> an elevated risk of heart disease, cancer, hypertension, and liver cirrhosis. Although quantifying the effects of this drug epidemic inadequately accounts for the enormous human suffering related to alcohol problems, the official toll is staggering: 100,000 lives lost each year and $100 billion in economic damage.
>
> Efforts to reduce the level of problems have included government-sponsored prevention, treatment, and education programs; new laws against drunken driving and their stricter enforcement; the 21-year old minimum legal drinking age; and a wide variety of community interventions and media messages. **Among the initiatives to reduce the demand for alcohol have been nationwide campaigns combating the aggressive advertising of alcoholic beverages.**

Hacker and Stuart, p. 1. (Emphasis in original).

There is a wealth of case law in this country granting states the right to regulate the alcoholic beverage industry. This regulation included restrictions on advertising in almost all 50 states. *See supra*, fn. 5. If the narrowly-tailored, precise and amply justified regulation at issue here cannot survive constitutional scrutiny, it is difficult to conceive of a state advertising regulation that could stand. Indeed, to abolish the State's power under the Twenty-first Amendment as it relates to alcoholic beverage advertising would probably undermine the alcoholic beverage regulations of all of these states. The State of

Rhode Island therefore respectfully requests that the decision of the First Circuit be affirmed.

Respectfully submitted,

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Supreme Court, U.S.
FILED
SEP 25 1995
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(18)

No. 94-1140

In The

Supreme Court of the United States

October Term, 1995

44 LIQUORMART, INC. and
PEOPLES SUPER LIQUOR STORES, INC.,

Petitioners,

v.

STATE OF RHODE ISLAND, and
RHODE ISLAND LIQUOR STORES ASSOCIATION,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit

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25 P

TABLE OF CONTENTS

Page

Argument 1

A. *Rubin v. Coors Brewing Co.*, Establishes That The State May Only Regulate Commercial Speech Concerning Alcoholic Beverages By Satisfying The *Central Hudson Test* 1

B. Rhode Island's Ban On Truthful, Non-Misleading Price Advertising Is An Unconstitutional Restriction Of Commercial Speech Because It Does Not Meet The *Central Hudson* Test 4

C. The State Distorts The Testimony Of Petitioners' Experts To Support A Vain Attempt To Overturn The District Court's Finding That Rhode Island's Off-Premises Advertising Ban Has Had No Material Impact On The Level Of Alcohol Consumption 13

D. The Court Does Not Condone A "Rational Basis" Standard To Decide The Constitutionality Of Governmental Restrictions On Truthful, Non-Misleading Price Advertising 16

Conclusion 20

TABLE OF AUTHORITIES

Page

CASES

44 Liquormart v. State of Rhode Island, 39 F.3d 5 (1st Cir. 1994) 7, 13, 19

44 Liquormart v. Racine, 829 F.Supp. 543 (D.R.I. 1993) 7, 10, 13, 16, 19

Anheuser-Busch, Inc. v. Schmoke, ___ F.3d ___, 1995 U.S. App. LEXIS 24515 (4th Cir. 1995) 11, 18, 19

Bates v. State Bar of Arizona, 433 U.S. 365 (1977) 5

Board of Trustees of State Univ. of New York v. Fox, 492 U.S. 469 (1989) 17, 18

California v. LaRue, 409 U.S. 109 (1972) 3

Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984) 11

Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557 (1980) ... *passim*

City of Cincinnati v. Discovery Network, 507 U.S. ___, 113 S.Ct. 1505 (1993) 3, 12, 17, 18

Edenfield v. Fane, 507 U.S. ___, 113 S.Ct. 1792 (1993) 3, 8, 10, 18

Florida Bar v. Went For It, Inc., ___ U.S. ___, 115 S.Ct. 2371 (1995) 3, 4

Ibanez v. Florida Dept. of Business and Professional Regulation, ___ U.S. ___, 114 S.Ct. 2084 (1994) 2, 3, 5, 18

Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico, 478 U.S. 328 (1986) 1, 3

TABLE OF AUTHORITIES – Continued

Page

Queensgate Investment Co. v. Liquor Control Commission, 69 Ohio St. 2d 361, 433 N.E.2d 138 (1982), *appeal dismissed*, 459 U.S. 807 (1982) 5

Rhode Island Liquor Stores Ass'n v. Evening Call Publishing Co., 497 A.2d 331 (R.I. 1985) 9

Rubin v. Coors Brewing Co., ___ U.S. ___, 115 S.Ct. 1585 (1995) ..... *passim*

S & S Liquor Mart, Inc. v. Pastore, 497 A.2d 729 (R.I. 1985) 10

Turner Broadcasting System v. FCC, 114 S.Ct. 2445 (1994) 19

United States v. Edge Broadcasting Co., 509 U.S. ___, 113 S.Ct. 2696 (1993) 1, 3

Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) 4

Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626 (1985) 3

MISCELLANEOUS

1981-1982 Op. Atty. Gen. Mich. 561, 1982 Mich. AG LEXIS 76 6

George A. Hacker and Laura Anne Stuart, DOUBLE DIP, THE SIMULTANEOUS DECLINE OF ALCOHOL ADVERTISING AND ALCOHOL PROBLEMS IN THE UNITED STATES, Center for Science in the Public Interest (June 1995) 11

John Jung, UNDER THE INFLUENCE (ALCOHOL AND HUMAN BEHAVIOR), (Brooks/Cole Pub. Co. 1994 6

TABLE OF AUTHORITIES – Continued

Page

Opinion No. 77-134, 1977 Ark. AG LEXIS 118 5

Tenn. Op. Atty. Gen. No. 80-207, 1980 WL 104092 5

Tenn. Op. Atty. Gen. No. 77-57, 1977 WL 28690 5

ARGUMENT

A. *Rubin v. Coors Brewing Co.*, Establishes That the State May Only Regulate Commercial Speech Concerning Alcoholic Beverages By Satisfying the *Central Hudson* Test.

The respondents and their supporting *amici curiae* urge the Court to abandon this year's holding in *Rubin v. Coors Brewing Co.*, ___ U.S. ___, 115 S.Ct. 1585 (1995), that restrictions on commercial speech concerning alcoholic beverages are subject to the same First Amendment standard as commercial speech concerning any other product. Their argument is based upon two premises: (1) consumption of alcoholic beverages is a "socially harmful" activity; (2) the Twenty-First Amendment reduces the protection accorded commercial speech by the First Amendment. Both points were raised and decided adversely to the respondents' position in *Rubin*.

Just as the respondents do here, the Government in *Rubin*, relying on *United States v. Edge Broadcasting Co.* 509 U.S. ___, 113 S.Ct. 2696 (1993), and *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986), argued that *Central Hudson* "imposes too strict a standard" for reviewing restrictions on commercial speech about alcoholic beverages because consumption of alcohol is a "socially harmful" activity. 115 U.S. at 1589-1590, fn 2. The Court declined to adopt a lesser standard, finding neither *Edge Broadcasting* nor *Posadas* supported the argument because both cases "applied the *Central Hudson* analysis." *Id.* Despite the clarity of the Court's pronouncement only six months ago, the respondents predicate most of their argument upon avowal of the same unprecedented hierarchy for protecting commercial speech based upon its subject matter that was flatly rejected in *Rubin*.[1]

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[1] RILSA maintains that this contention is the "bedrock issue presented in this case." RILSA Brief, 5.

Discarding the *Central Hudson* test in favor of affording a lower level of protection for speech about activities deemed by regulators to be "socially harmful" would effectively wipe away all the decisions of this Court establishing and defining the First Amendment's protection for commercial speech. Virtually all products result from, or, in some instances, may lead to, a "socially harmful" outcome in someone's view. Thus, commercial speech about almost any product could be held subject to lesser protection if the attributes of the product, instead of the attributes of the speech, were the determinative factor. For example, motor vehicles, both in their manufacture and use, pose risks of a variety of social harms, including accidental deaths and injuries, traffic congestion, depletion of natural resources and air pollution. Government has ample power, if not always the political will, to regulate production and operation to strike a balance between the automobile's benefits and harms. According to the respondents' argument, despite the strictures of the First Amendment, government may also prohibit truthful, non-misleading price advertising of automobiles (or any product deemed "socially harmful") to reduce competition among retailers and thus create an "artificial price floor" that would inhibit sales. From the time it fully recognized that the First Amendment protected commercial speech, the Court has never upheld a restriction solely because the subject matter was a product deemed "socially harmful." In *Rubin*, the Court emphasized that "certain types of restrictions might be tolerated in the commercial speech area *because of the nature of such speech.*" 115 S.Ct. at 1589 [*emphasis added*]. The Court requires that would-be regulators satisfy the *Central Hudson* test, which focuses on "distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful" in the speech itself. *Ibanez v. Florida Dept. of Business and Professional Regulation*, ___ U.S. ___, 114 S.Ct. 2084, 2089 (1994), *quoting*

Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626, 646 (1985).

Rubin also unambiguously negates the respondents' other "bedrock" argument that the Twenty-first Amendment affords Rhode Island's ban on truthful, non-misleading price advertising an "added presumption of validity." RILSA Brief, 6-16,[2] State Brief, 37-42. The Court distinguished *California v. LaRue*, 409 U.S. 109 (1972), the case relied upon by the respondents and the Court of Appeals, because it "did not involve commercial speech about alcohol, but instead concerned the regulation of nude dancing in places where alcohol was served." *Rubin*, 115 S.Ct. at 1590, n.2. More pointedly, the Court was explicit that the states' authority to regulate commercial speech about alcoholic beverages is "subject to *the same First Amendment restrictions* that apply to the Federal Government." *Id.* at 1591 [*emphasis added*]. Since the Twenty-first Amendment does not lessen the First Amendment's restrictions on the Federal Government, it cannot be argued consistently with *Rubin* that the Twenty-first Amendment depreciates the First Amendment's restrictions on the states. The respondents' attempts to evade *Central Hudson*, as it has been applied in *Edenfield v. Fane*, 507 U.S. ___, 113 S.Ct. 1792 (1993), *City of Cincinnati v. Discovery Network*, 507 U.S. ___, 113 S.Ct. 1505 (1993), *Ibanez*, and *Rubin*, must fail.[3]

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[2] RILSA's brief offers a confused intermingling of the Twenty-first Amendment argument and the "socially harmful" argument. Although purportedly discussing the effect of the Twenty-first Amendment on beverage vendors' First Amendment rights, RILSA Brief, 6-9, the brief relies heavily on *Posadas* and *Edge Broadcasting*, cases that have nothing to do with the Twenty-first Amendment, while ignoring *Rubin's* straightforward rejection of the government's argument that they support a more lenient standard. RILSA Brief, 9-13.

[3] The respondents cite the Court's most recent commercial speech decision, *Florida Bar v. Went For It, Inc.*, ___ U.S. ___, 115

B. Rhode Island's Ban On Truthful, Non-misleading Price Advertising Is an Unconstitutional Restriction of Commercial Speech Because It Does Not Meet the *Central Hudson* Test.

By starting out with strenuous arguments for a lower standard of review, respondents virtually concede that Rhode Island's ban on truthful, non-misleading price advertising is an unconstitutional restriction of commercial speech under the *Central Hudson* test as the Court has refined it. *Central Hudson* requires that the State's asserted interest in banning commercial speech be weighed against the substantial interest of Rhode Island consumers and vendors in the "free flow of commercial information." The respondents and their supporting *amici* never acknowledge that truthful, non-misleading price information has been uniformly accorded constitutional protection by the Court because it is "indispensable" to the preservation of our free enterprise economy. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976). For that reason, the consumer's interest in obtaining price information through advertising is protected by the First Amendment, as well as the vendor's interest in providing the information. *Id.*,

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S. Ct. 2371 (1995), as support for several of their arguments in favor of reducing their burden. RILSA Brief, 20, State Brief, 16, 34-35. The citations do not support the respondents. *Florida Bar* concerns the application of the *Central Hudson* test to "ambulance chasing" by attorneys. The decision is predicated on a record, "noted for its breadth and detail," in support of the regulation, that was "at no time refuted, save by the conclusory assertion that the rule lacked 'any factual basis.' " 115 S.Ct. 2377-2378. The harm the restriction in *Florida Bar* sought to avoid was inherent in the speech itself. The Court did not depart from the rigors of the *Central Hudson* test.

Bates v. State Bar of Arizona, 433 U.S. 365, 353-354 (1977).[4] The State predicates its argument on trivializing the importance of price information as the "least informative speech concerning a product," State Brief, 17, and "only one tidbit of information." State Brief, 29.[5] It goes so far as to advocate that "*price advertising should be afforded the least amount of protection in the entire spectrum of First Amendment values.*" State Brief, 17 [*emphasis added*]. Rhode Island's disdain for the interest of all its citizens, consumers and vendors, in obtaining truthful, non-misleading price information about a lawful product is unsupportable in light of the Court's price advertising decisions.[6]

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[4] *Queensgate Investment Co. v. Liquor Control Commission*, 69 Ohio St. 2d 361, 433 N.E.2d 138 (1982), *appeal dismissed*, 459 U.S. 807 (1982), is not to the contrary, despite the State's distorted presentation of it as a precedent that would "mandate affirmance of the First Circuit." State Brief, 21. *See* the reasons set forth in the Brief of the Beer Institute, *et al. amici curiae* at 18, n.9.

[5] In ironic contrast, RILSA speculates that price advertising is so important that without it, "merchants may well decide not to advertise at all." RILSA Brief, 23. Of course RILSA's "speculation or conjecture will not suffice" to meet the State's burden under the *Central Hudson* test. *Ibanez*, 114 S.Ct. at 2089.

[6] Some states have taken the Court's declaration of the importance of truthful, non-misleading price information seriously. In 1977, the Attorney General of Arkansas issued an opinion that Arkansas' statute banning price advertising violated the First Amendment. His reasoning was based upon the importance of price information to "any economic selection." "A prohibition on publication of price, then, is a material abridgement of freedom of speech." Opinion No. 77-134, 1977 Ark. AG LEXIS 118. Also in 1977, and again in 1980, the Attorney General of Tennessee issued opinions that regulations of the Tennessee Alcoholic Beverage Commission banning price advertising were unconstitutional. His reasoning was similarly based on the importance of price information to the consumer. Tenn. Op. Atty. Gen. No. 77-57, 1977 WL 28690; Tenn. Op. Atty.

In the District Court, the State's Attorney General conceded that Rhode Island was not concerned with responsible consumers, but that its interest was limited to reducing abusive consumption by reducing the availability of alcoholic beverages to persons of limited means (J.A. 67). Of course, suppression of truthful, non-misleading price information "hits the hardest" at the poor. *Virginia State Bd. of Pharmacy*, 425 U.S. at 763. The State's unsupported theory of the "artificial price floor" is not even relevant to abusers above some undefined income level.[7] The State, therefore, has not met its burden under the third part of the *Central Hudson* test to prove that its ban on truthful, non-misleading price advertising has had any deterrent effect on abusive consumption, even by the impecunious. To the contrary, sadly, it is commonly known that alcoholics will consume shaving lotion, Sterno, or any other substance containing alcohol, when beverage alcohol is not available.[8] Nor has the State shown that its price advertising ban, which surely affects mostly advertisements for popular brands,[9] has caused retailers not to carry less expensive off-brand or house

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Gen. No. 80-207, 1980 WL 104092. *See, also*, 1981-1982 Op. Atty. Gen. Mich. 561, 1982 Mich. AG LEXIS 76.

[7] Indeed, another defect in the theory is shown because the State's expert had no idea what effect the ban actually had on prices. The State's expert did not know what an optimum price would be, what effect the price advertising ban had on Rhode Island prices, or how much prices would change without the ban (R. Saffer Tr. 43-49). It is therefore impossible to know what socioeconomic group could be affected. Without that information it is impossible to determine if the ban has any material effect on consumption.

[8] "[T]he highly addicted drinker . . . will forego other needs to spend economic resources on alcohol." John Jung, UNDER THE INFLUENCE (ALCOHOL AND HUMAN BEHAVIOR), (Brooks/Cole Pub. Co.1994) p. 302.

[9] *See, e.g.*, J.A. 49.

brand beverages to satisfy the demand of their low income customers. Finally, the State offered nothing to show what price differential could be expected between a regime banning price advertising and one that does not. Without such information it is impossible to demonstrate how banning price advertising could affect prices of the cheapest off-brand products enough to affect abusive consumption. What has been proved is that with its price advertising ban in place, Rhode Island is in the top 30% of states in per capita consumption, evidence of the inefficacy of its policy. 44 *Liquormart v. Racine*, 829 F.Supp. 543, 546 (D.R.I. 1993) (App. 23). It is also known that a study of total sales before, during and after the imposition of price advertising restrictions for beer showed that "the presence of price advertising has *no significant effect on beer consumption*" (J.A. 92) [*emphasis added*].

Unable to prove any harm that flows directly from providing consumers with accurate price information, and unable to show that the price advertising ban has had any effect on the State's asserted interest in reducing intemperate consumption by Rhode Island's poorer citizens, the respondents shift ground in their arguments to this Court. They attempt to justify the statute by postulating a State interest in suppressing all consumption of alcoholic beverages as "socially harmful." RILSA Brief, 18-19, State Brief, 32. They, along with the Court of Appeals, would regulate speech as if the social consequences of one drink with dinner, or consuming a beer while playing cards with friends, was the equivalent of alcoholism.[10] They argue that any consumption is "socially harmful" so that any reduction in consumption

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[10] The Court of Appeals only concerned itself with the hypothesis that lower prices would bring "more sales" without relating that hypothesis to the State's much more limited asserted interest. 44 *Liquormart v. Rhode Island*, 39 F.3d at 7 (App. 7).

is in furtherance of the State's interest. RILSA Brief, 25, State Brief, 22-23.

This belated change in the identified state interest should be rejected because to do otherwise would enable regulators to hide their real purpose behind an ever-changing array of suppositions. The first task of the Court in undertaking the *Central Hudson* analysis is to carefully ascertain the genuineness of the precise interests the State claims to be advancing by restricting speech.

> In undertaking the first inquiry, we must identify with care the interests the State itself asserts. Unlike rational basis review, the *Central Hudson* standard does not permit us to supplant the precise interests put forward by the State with other suppositions. Neither will we turn away if it appears that the stated interests are not the actual interests served by the restriction. *Edenfield*, 113 S.Ct. at 1798 [*citations omitted*].

If the required inquiry is to have any meaning, when the "important interest" asserted in the trial court is found unavailing, the State should not be permitted to conjure up others.

However, by abandoning the interest, conceded below, in discouraging abusive consumption by the poor in favor of the interest in discouraging *any* consumption asserted here, the respondents not only fail to satisfy the requirement that the precise interests put forward by the State may not be supplanted, they fail to assert an important interest at all.[11] Indeed, the newly asserted interest in

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[11] *Central Hudson* suggests that restricting advertising to suppress demand for electricity from a monopoly vendor may further a substantial governmental interest where there is an "energy crisis." 447 U.S. at 568-569. Under such circumstances *any* demand for the product is detrimental to the important governmental interest in conservation. Here, only demand for

reducing consumption *vel non* proves the insubstantiality of the respondents' case. In the State's view, it would be a legitimate goal, justifying suppression of truthful, non-misleading price information, to cause a consumer who drinks one beer a week, or a glass of wine with dinner, to consume less. Even if that were the case, the State has not met its burden of proving that such an interest has been directly and materially advanced by its ban on speech.

One way of determining if the State has proved the requisite "immediate connection" between the government's asserted interest and its prohibition of speech, which was ignored by the Court of Appeals, is to examine the degree to which the State attempts to further its asserted goal through regulation. The substantiality of the relationship between the restriction on speech and the asserted goal is tested by the seriousness and consistency with which the goal is pursued. *Rubin*, 115 S.Ct. at 1592-1593. At the heart of this analysis is the question of whether the State has proved that its asserted goal is its true objective.[12] "Without this requirement, a State could

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the product by the small percentage of consumers who abuse it is harmful. They are unlikely to be deterred by the State's hypothetical "artificial price floor" for brand name advertised products and will satisfy their demand with inexpensive products.

[12] In his dissent to the opinion of the Rhode Island Supreme Court that upheld the price advertising ban for newspapers, Justice Weinberger persuasively writes that the true motivation for enforcement of the price advertising ban has "nothing to do with the 'promotion of temperance' among Rhode Island citizens, but rather with the promotion of price ignorance" to protect the market share of RILSA's members. *Rhode Island Liquor Stores Ass'n. v. Evening Call Publishing Co.*, 497 A.2d 331, 342 n.10 (R.I. 1985). Confirming his view, in this case RILSA urges that virtually all its members' constitutional rights be eliminated in order to maintain the price advertising ban and thus restrict competition among retailers. RILSA's members obviously find it more important to be free from competition than to be protected from unbridled governmental regulation.

with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression." *Edenfield*, 113 S.Ct. at 1800.

Despite its newly proffered concern with reducing consumption in general, Rhode Island permits all forms of advertising which, according to the State, directly try to stimulate the desire to consume alcoholic beverages.[13] Consumers are denied only price information. As the Rhode Island Supreme Court humorously put it: "Rhode Islanders' thirst for alcoholic-beverage advertising will have to be quenched through the electronic and print media *constantly reminding them* of such thoughts as 'This Bud's for you' or 'It's Miller Time.'" *S & S Liquor Mart, Inc. v. Pastore*, 497 A.2d 729, 734 (R.I. 1985) [*emphasis added*]. A consumer who has thereby been persuaded that it is "Miller time" and sets out to buy a six-pack will be able to check the advertisements and find many places where Miller beer is sold, but not know which one offers the best price. Common sense says that this will not dissuade the purchase, but only enable retailers to maintain high margins at the consumer's expense. Rhode Island presented no empirical data to the contrary.[14]

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[13] *But see* the discussion of advertising directed at obtaining increased market share in a "mature market." Petitioner's Brief, 19-20.

[14] In its Brief at 28, Rhode Island offers a 1995 "study" by the "Center for Science in the Public Interest" to refute the District Court's finding, based upon the testimony of Dr. Smart, that "on a national scale, over the past fifteen years, consumption levels generally have decreased even though overall advertising levels have increased." 44 *Liquormart v. Racine*, 828 F. Supp. 543, 546 (D.R.I. 1993) (App. 23-24). Without verifying the scientific qualifications of the authors, it is impossible to give the study any credence. Unlike Dr. Smart, they did not testify under oath and subject themselves and their theories to cross examination. The public record shows that one of the two

Courts are rightly loath to guess at hidden motivation for legislation. Consequently, the second part of *Central Hudson* focuses on the interest the State claims it is trying to advance, rather than divining what is the real interest. However, proper application of the third and fourth parts of the test (that is holding the State to its burden of proof and requiring more than a rational basis to support the restriction), will often find the restriction lacking if the real objective is other than that stated. Here, the fact that Rhode Island has not even attempted to regulate any advertising of alcoholic beverages other than truthful, non-misleading price advertising, is persuasive evidence of the lack of connection between the price advertising regulation and the proffered governmental interest in reducing overall consumption.

In *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984), the State of Oklahoma asserted that it banned wine commercials that appeared on out-of-state signals carried by cable operators in order to "promote temperance." However, since Oklahoma permitted "print and broadcast commercials for beer, as well as advertisements

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authors, George Hacker, is an attorney employed by the "Center" who submitted an *amicus* brief to the Fourth Circuit in support of a ban on billboard advertising of alcoholic beverages. *Anheuser-Busch, Inc. v. Schmoke*, ___ F.3d ___, 1995 U.S. App. LEXIS 24515 (4th Cir. 1995). The "Center" is not an academic institution or think tank. It is an advocacy group whose agenda, according to the statement of interest in its *amicus* brief, is to suppress alcohol advertising. Despite this bias, the findings of the "study" are inconclusive. The authors state that "it is impossible to know the extent to which reductions in alcohol advertising helped lower drinking rates." More significantly, the Hacker-Stuart "study" avers that "the reduction of *highly visible, repetitive, seductive appeals to drink* is almost certainly part of the equation." Hacker and Stuart, p. 14 [*emphasis added*]. Thus, the type of advertising thought by the authors of the study to affect consumption is not price advertising, but precisely the kind of advertising that is *permitted* in Rhode Island.

for all alcoholic beverages contained in newspapers, magazines and other publications printed outside the State" the Court found Oklahoma's "selective approach" undermined its claim to be furthering a substantial interest.

> By their own terms, therefore, the State's regulatory aims in this area are narrow. Although a state regulatory scheme obviously need not amount to a comprehensive attack on the problems of alcohol consumption to constitute a valid exercise of state power under the Twenty-first Amendment, *the selective approach Oklahoma has taken toward liquor advertising suggests limits on the substantiality of the interests it asserts here.* 467 U.S. at 715 [emphasis added].

In *Discovery Network*, the Court again stressed that underregulation vis-a-vis the asserted State interest supports finding a restriction of commercial speech invalid.

> The fact that the regulation "provide[d] only the most limited incremental support for the interest asserted" . . . – that it achieved only a "marginal degree of protection" . . . for that interest – supported our holding that the prohibition was invalid. 113 S. Ct. at 1515 [*citations omitted*].

Most recently, in striking down a ban on labeling the alcoholic content of beer that the government sought to justify as preventing "strength wars," the Court noted the illogic of the government's position based upon the limited scope of its prohibition. The Court pointed to the "irrationality" of the regulatory framework in light of its asserted goal in concluding that "[t]here is little chance that [the regulation] can directly and materially advance its aim, while other provisions of the same act directly undermine and counteract its effects." *Rubin*, 115 S.Ct. at 1593. So, too, in this case, it makes no sense for the State to claim that it has a real interest in withholding truthful, non-misleading price information to reduce consumption, while it permits the public to be "constantly" exposed to all other alcoholic beverages advertising.

C. The State Distorts the Testimony of Petitioners' Experts to Support A Vain Attempt to Overturn the District Court's Finding That Rhode Island's Off-premises Advertising Ban Has Had No Material Impact On the Level of Alcohol Consumption.

Based upon careful and reasoned evaluation of the testimony presented, the District Court found that Rhode Island's off-premises price advertising ban has had no material impact on the level of alcohol consumption. *44 Liquormart, Inc. v. Racine*, 829 F.Supp. at 549 (App. 31). The Court of Appeals based its decision on its conclusion that the evidence went "both ways," erroneously permitting the State to meet its burden under *Central Hudson*, merely by offering some, but not preponderant, evidence. *44 Liquormart v. State of Rhode Island*, 39 F.3d 5, 7 (1st Cir. 1994) (App. 6). The State would have this Court go even further than the Court of Appeals, by supplanting the District Court's finding with a determination that the price advertising ban has had a material impact on the level of consumption. State Brief, 23-28. However, in arguing that the District Court's careful analysis is wrong because the petitioners' experts support its position, the State relies upon distortion and omission of key parts of the experts' testimony to conceal its lack of proof.

The State selects snippits of testimony by Drs. Smart and Pittman to suggest that they contributed "substantial evidence" that the "price advertising ban increases the price of alcoholic beverages, thus resulting in decreased consumption." State Brief, 28. For example, the State claims that Dr. Smart "acknowledged" that there are two "camps" of opinion on the relation between advertising in general and alcohol consumption in general, one of which finds a connection. State Brief, 24. Of course, the issue here is the relationship between Rhode Island's price advertising ban and consumption by Rhode

Islanders. That aside, the State distorts Dr. Smart's testimony. All Dr. Smart acknowledged was that *"some* citizens groups, politicians, *some* professionals and research experts *sometimes* assert that alcohol advertising leads to increased overall consumption." J.A. 75 [*emphasis added*].

The State again engages in distortion when it argues "[o]f most importance to the case is Dr. Smart's testimony that price is a *potent* influence on the level of alcohol consumption." State Brief, 25 [*emphasis added*].

> Q. . . . Now, there is one paragraph that begins at the bottom of the first column and continues into the top of the second that talks about the affect (*sic*) of price on alcoholic beverages. Doctor, I think can we establish you agree that price has *an affect* (*sic*) on consumption, price of alcoholic beverages has *an affect* (*sic*) on consumption?
>
> A. I would say so, particularly if you relate price to disposable income. J.A. 80 [*emphasis added*].

The State's question to Dr. Smart was obviously made in reference to a particular publication. Dr. Smart *did* agree with the conclusions of the authors[15] and did agree that the price of alcoholic beverages has an effect on consumption "if you relate price to disposable income." The State fails, however, to include Dr. Smart's earlier comments regarding the study at issue. Dr. Smart agreed that there is an *expectation* that advertising reduced prices will increase alcohol consumption and that the authors of the study included that *expectation*. (R. Smart Tr. 44). Regarding the findings of the study, which – according to Dr. Smart – were mere expectations, Dr. Smart testified that he agreed with the findings as far as they went but qualified his agreement: "I think that what their findings are is a little confusing in that what we see

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[15] The subject is the work by Ornstein and Hanssens (J.A. 94).

in the article is an affect (*sic*) of price advertising for print and billboards for all states considered together but not when we consider only license states." *Id.*

At no point did Dr. Smart testify that the supposed link between advertised price and consumption transcends the theoretical bonds of mere expectation to become reality in Rhode Island.

Another example of the State's creative use of excerpts is its claim that "Dr. Smart finds the statement that 'a ban on price advertising raises the means and variance of price by increasing search costs and this results in lower consumption' to be a reasonable expectation." State Brief, 25. The State failed to report the entire sentence: *"I think that's a speculation on their part because they don't have any data on search costs,* but I think it's a reasonable expectation." J.A. 80 [*emphasis added*].

Dr. Smart did not, as the State suggests, adopt the State's view. Instead, he simply found that a certain expectation was theorectically reasonable. Dr. Smart's insistence on the speculative nature of that expectation underscores the fact that he did not abandon his opinion in favor of that expressed by the State's expert.

Dr. Pittman did not escape the State's use of misleading excerpts. The State cites testimony by Dr. Pittman in which he stated that if the Rhode Island advertising ban were to be lifted, lower alcohol price would be a direct effect. State Brief, 26. The State attaches considerable importance to the testimony it cites, arguing that Dr. Pittman "made the State's case." *Id.* While the State did succeed in causing Dr. Pittman to agree that a "direct effect" on alcohol consumption would result from a repeal of the advertising ban, the State failed to report that Dr. Pittman believes that the "direct effect" would be "small and insignificant" (R. Pittman Tr. 12). The State's expert had no opinion on the magnitude of the effect of the price advertising ban on prices (R. Saffer Tr. 45-46). Thus, the State's case was, as found by the District Court, refuted by the petitioners' experts and not substantiated

by the State's expert. 44 *Liquormart v. Racine*, 829 F.Supp. at 546-549 (App. 22-31). Rhode Island utterly failed to meet its burden under *Central Hudson* to prove that its theory was realized. It did not prove that the price advertising ban had "directly and materially" advanced the asserted goal of promoting temperance, whether that goal is defined as reducing abusive consumption by the poor, or reducing consumption in general.

D. The Court Does Not Condone a "Rational Basis" Standard To Decide the Constitutionality of Governmental Restrictions On Truthful, Non-misleading Price Advertising.

In asserting that Rhode Island's ban on truthful, non-misleading price advertising is sustainable under the *Central Hudson* test, the respondents and their supporting *amici curiae* argue for a lesser standard of review than the Court has set for the protection of commercial speech. The Council of State Governments, *et al.* (Council), devote most of their *amicus* brief to arguing that the Court should defer to the legislative judgment, both as to whether the ban on speech directly and materially advances the asserted interest and the propriety of the "fit" between the suppression of speech and the result to be accomplished.

The Council misrepresents the petitioners' argument in order to create an easy target for its own. For example, it suggests that the petitioners argue that: Rhode Island must "demonstrate that a particular measure is guaranteed to work perfectly or that it is unanimously endorsed by experts in the field," Council Brief, 4; a legislature must consider "every imaginable alternative or prove that the one it selected is the least restrictive of speech," *Id.*; a State must "produce uncontroverted, conclusive empirical evidence that its asserted interest will be directly and materially advanced," Council Brief, 9; a State must present "exhaustive empirical data," *Id.* Of course the petitioners never made such arguments, which

are straw men set up by the Council to mask the fact that despite its lip service to *Central Hudson*, it is really arguing for the application of a "rational basis" test that would be the end of any meaningful protection for commercial speech.

> While the test "is not satisfied by mere speculation or conjecture," *Edenfield, 113 S.Ct. at 1800*, neither does it require production of evidence of a quality and quantity that might be necessary to convince a trier of fact of the truth of a particular matter. It requires only a basis sufficient to support a reasonable belief on the part of the legislature as to the measure's efficacy. Council Brief, 9.

Thus, the Council and respondents would have the Court reverse its recent holding in *Ibanez* that the "State's burden is not slight" as well as its holding in *Rubin* that it was "critical" to the *Central Hudson* analysis that the State "must demonstrate that the harms it recites are real and that its restriction will *in fact* alleviate them to a material degree," 115 S.Ct. at 1592 [*emphasis added*], in favor of asking only if the legislature could have reasonably believed in "the measure's efficacy." No amount of verbal camouflage can disguise the fact that the respondents and their *amici* are arguing for the very rational basis test that the Court has repeatedly said is *"far different"* from the level of scrutiny required by *Central Hudson*. *Board of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 480 (1989) [*emphasis added*]; *Discovery Network*, 113 S.Ct. at 1510, n.13.

Contrary to the Council's hyperbole, enforcement of *Central Hudson* does not paralyze regulators from addressing social problems. Council Brief, 13. Government has broad authority to regulate commerce, typically subject only to "rational basis" review by the courts. But if the government attempts instead to censor speech in the hope of manipulating consumer behavior, it must then confront the strong constitutional presumption in favor of the "free flow of commercial information" and

has assumed the substantial burden of proof required by *Central Hudson* and its descendants.

We are informed that the respondents will submit the recent decision of the Fourth Circuit Court of Appeals in *Anheuser-Busch, Inc. v. Schmoke*, ___ F.3d ___, 1995 U.S. App. LEXIS 24515 (4th Cir. 1995), as supplemental authority. In that case, the Court of Appeals affirmed the District Court's judgment upholding a Baltimore ordinance banning outdoor advertising of alcoholic beverages in certain locations based on the city's assertion that the ban was necessary to promote the "welfare and temperance" of minors. In so doing, the Court of Appeals adopted a method of review that completely avoided this Court's formulation of the burden of proof on the government: it deferred to the legislative judgment.

> On this facial challenge, the City bears the burden not of establishing that at every coordinate the regulation advances a governmental purpose and does no more, but rather that it had *an objectively reasonable belief* that the means which it selected constituted a reasonable "fit" with the regulation's purpose. 1995 U.S. App. LEXIS 24515 at 14 [*emphasis added*].

The decision of the Fourth Circuit is a misapplication of the "rational basis" test for economic regulation to a ban on commercial speech. *See Board of Trustees of State Univ. of New York v. Fox, supra.* It is written as if *Edenfield, Discovery Network, Ibanez* and *Rubin* did not pertain.[16] Nonetheless, the Fourth Circuit did make one reference to *Rubin*, in a footnote that questions the validity of the decision of the Court of Appeals below.

> The rationale for the more general restriction prohibiting the advertising of alcoholic beverages, upheld in *Dunagin* and *Crisp*, may, however, be insufficient to support a general

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[16] *Edenfield* is cited two times, but not as a controlling authority. *Discovery Network* and *Ibanez* are not cited at all.

> prohibition against price advertising of alcoholic beverages, even though such a restriction was upheld in *44 Liquormart, Inc. v. Rhode Island*, 39 F.3d 5 (1st Cir. 1994), *cert. granted*, 115 S. Ct. 1821 (1995). *Cf. Rubin v. Coors Brewing Co.*, 131 L. Ed. 2d 532, 115 S. Ct. 1585 (1995) (finding unconstitutional a labeling ban on the disclosure of alcohol content to combat "strength wars"). 1995 U.S. App. LEXIS 24515 at 27, n.5.

While the footnote in *Anheuser-Busch* marginalizes *Rubin* as precedent for general restrictions on alcoholic beverages advertising, at least the Fourth Circuit recognized the distinction between a general advertising ban and a ban on truthful, non-misleading price advertising that the respondents and the Court of Appeals below do not address.[17]

The Council relies upon language in *Turner Broadcasting System v. FCC*, 114 S.Ct. 2445 (1994), in support of its plea that the Court defer to the "legislative findings" of the Rhode Island legislature. Council Brief, 9-11. It misses the central point of *Turner*. The Court concluded that summary judgment in favor of the governmental regulation should not have been granted despite a broad legislative record. Therefore, under First Amendment intermediate scrutiny, issues of fact must be resolved on the basis of evidence presented in a trial, not by deferring to legislative judgment.[18]

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[17] The District Court below did appreciate the difference and was careful to limit its decision. *44 Liquormart v. Racine*, 829 F. Supp. at 549, n.6, (App. 31). RILSA, by invoking a "battle against various vices," is attempting to have the Court decide cases that are not before it. RILSA Brief, 30-34.

[18] To make this argument in this case is odd as well as misdirected. As RILSA admits, "the reasoning of the Rhode Island General Assembly must remain a matter of conjecture for all parties" because "Rhode Island has no recorded legislative history" for the statutes in issue. RILSA Brief, 11, n.6.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Brief for Petitioners, the petitioners respectfully submit that the judgment of the Court of Appeals should be reversed.

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No. 94-1140

Supreme Court, U.S.
FILED
JUL 3 1995
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

44 LIQUORMART, INC. and
PEOPLES SUPER LIQUOR STORES, INC.,

Petitioners,

—v.—

STATE OF RHODE ISLAND, and
RHODE ISLAND LIQUOR STORES ASSOCIATION,

Respondents.

ON WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF RHODE ISLAND IN SUPPORT OF PETITIONERS

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3/22

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI* 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 5

ARGUMENT 6

I. LAWS THAT PATERNALISTICALLY DENY CITIZENS TRUTHFUL PRICE INFORMATION IN ORDER TO INFLUENCE OR CONTROL BEHAVIOR VIOLATE THE FIRST AMENDMENT 6

A. The First Amendment Interest In Receiving Truthful Information Is The Same Regardless Of Whether The Information Is Supplied In The Context Of Commercial Or Noncommercial Speech 6

B. A State's Interest In Discouraging Harmful Activities, Including Its Power To Ban Such Activities, Does Not Justify The Suppression Of Truthful Information 12

II. THE TWENTY-FIRST AMENDMENT DOES NOT PERMIT GOVERNMENT SUPPRESSION OF TRUTHFUL ALCOHOL PRICE INFORMATION OR JUSTIFY ANY WEAKENING OF FIRST AMENDMENT SCRUTINY 16

Page

III. RHODE ISLAND'S BAN ON TRUTHFUL PRICE ADVERTISING IS UNCONSTITUTIONAL UNDER THE *CENTRAL HUDSON* TEST 20

CONCLUSION 23

TABLE OF AUTHORITIES

Page

Cases

Arkansas Writers' Project v. Ragland,
481 U.S. 221 (1987) 13

Barnes v. Glen Theatre, Inc.,
501 U.S. __, 111 S.Ct. 2456 (1991) 19

Bates v. State Bar of Arizona,
433 U.S. 350 (1977) 8

Bigelow v. Virginia,
421 U.S. 809 (1975) 13

Board of Education, Island Trees School Dist. v. Pico,
457 U.S. 853 (1982) 9

Board of Trustees of the State University of New York v. Fox,
492 U.S. 469 (1989) 20

Bolger v. Young Drug Products Corp.,
463 U.S. 60 (1983) 7

Brandenburg v. Ohio,
395 U.S. 444 (1969) 11

California Retail Liquor Dealers v. Midcal Aluminum, Inc.,
445 U.S. 97 (1980) 17, 22

California v. LaRue,
409 U.S. 109 (1972) 17, 18, 19

Capital Broadcasting Co. v. Mitchell,
333 F.Supp. 582 (D.D.C. 1971),
sum. aff'd, 405 U.S. 1000 (1972) 22

Page

Carey v. Brown,
447 U.S. 455 (1980) 14

Carey v. Population Services, Int'l,
431 U.S. 678 (1977) 13

Central Hudson Gas & Electric Corp. v. Public Service Comm'n,
447 U.S. 557 (1980) . . . . . *passim*

Cincinnati v. Discovery Network, Inc.,
507 U.S. __,113 S.Ct. 1505 (1993) 6, 7

City of Ladue v. Gilleo,
512 U.S. __, , 114 S.Ct. 2038 (1994) 9, 14

City of Newport v. Iacobucci,
479 U.S. 92 (1986) 18

Craig v. Boren,
429 U.S. 190 (1976) 17, 19

Doran v. Salem Inn, Inc.,
422 U.S. 922 (1975) 19

Dunagin v. Oxford,
718 F.2d 738 (5th Cir. 1983),
cert. denied, 467 U.S. 1259 (1984) 4, 19

Edenfield v. Fane,
507 U.S. __, 113 S.Ct. 1792 (1993) 3, 20

Eu v. San Francisco County v. Democratic Central Comm.,
489 U.S. 214 (1989) 9

First National Bank of Boston v. Bellotti,
435 U.S. 765 (1978) 8, 14

Page

Florida Bar v. Went For It, Inc.,
__ U.S. __,
63 U.S.L.W. 4644 (June 21, 1995) 3, 8, 9, 21

Healy v. The Beer Institute,
491 U.S. 324 (1989) 16

Hostetter v. Idelwild Liquor Corp.,
377 U.S. 324 (1964) 16

Kleindienst v. Mandel,
408 U.S. 753 (1972) 9

Lamont v. Postmaster General,
381 U.S. 301 (1965) 9

Larkin v. Grendel's Den, Inc.,
459 U.S. 116 (1982) 16

Linmark Associates, Inc. v. Willingboro,
431 U.S. 85 (1977) 9, 14, 15

Michigan Beer & Wine Wholesalers Ass'n
v. Michigan Liquor Control Comm'n,
370 N.W.2d 328 (Mich.Ct.App.1985) 19

NAACP v. Cornelius,
473 U.S. 788 (1985) 14

New York State Liquor Authority
v. Bellanca,
452 U.S. 714 (1981) 17, 18, 19

Oklahoma Telecasters Ass'n v. Crisp,
699 F.2d 490 (10th Cir. 1983),
rev'd on other grounds sub nom.
Capital Cities Cable, Inc. v. Crisp,
467 U.S. 691 (1984) 4, 16, 17, 19

Page

Perry Education Ass'n v. Perry Local Educators' Ass'n, 450 U.S. 37 (1983) 14

Posadas de Puerto Rico Assoc. v. Tourism Co., 478 U.S 328 (1986) 4, 5, 12, 13

Queensgate Investment Co. v. Liquor Control Comm'n, 459 U.S. 807 (1982) 4

R.A.V. v. City of St. Paul, 505 U.S. __, 112 S.Ct. 2538 (1992) 14

Regan v. Taxation with Representation, 461 U.S. 540 (1983) 22

Rhode Island Liquor Stores Ass'n v. The Evening Call, 497 A.2d 331 (R.I. 1985) 20, 21

Rubin v. Coors Brewing Co., __ U.S. __, 115 S.Ct. 1585 (1995) . . . . . *passim*

S & S Liquor Mart, Inc. v. Pastore, 497 A.2d 729 (R.I. 1985) 20

Simon & Schuster v. Members of the New York State Crime Victims Board, 502 U.S. 105 (1991) 10, 13

Speiser v. Randall, 357 U.S. 513 (1958) 22

Stanley v. Georgia, 394 U.S. 557 (1969) 9

Page

United States v. Edge Broadcasting Co.,
509 U.S. __, 113 S.Ct. 2696 (1993) 12, 13

United States v. National Treasury Employees Union,
513 U.S. __, 115 S.Ct. 1003 (1995) 9

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,
425 U.S. 748 (1976) 7, 8, 9, 15

Whitney v. California,
274 U.S. 357 (1927) 11

Wisconsin v. Constantineau,
400 U.S. 433 (1971) 17

Ziffrin v. Reeves,
308 U.S. 132 (1939) 16

Statutes and Regulations

R.I. Gen. Laws §3-8-7 1

R.I. Gen. Laws §3-8-8.1 . . . . . 1, 10

Other Authorities

Brest, Paul, PROCESSES OF CONSTITUTIONAL DECISIONMAKING (1975) 17

Joyce, James, ULYSSES (Bodley Head ed. 1960) 18

Note, "Constitutional Protection of Commercial Speech," 82 Colum.L.Rev. 720 (1982) 9

INTEREST OF *AMICI* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU of Rhode Island is its statewide affiliate. Since its founding in 1920, the ACLU has vigorously defended the free speech principles of the First Amendment and has appeared before this Court on numerous occasions, both as direct counsel and as *amicus curiae*, in cases challenging governmental actions that threaten First Amendment rights. Because this case raises fundamental questions about the ability of government to suppress truthful and non-misleading information about a lawful product, *amici* respectfully submit this brief urging reversal of the decision below.

STATEMENT OF THE CASE

Two Rhode Island statutes are challenged in this appeal. R.I. Gen. Laws §3-8-7 prohibits manufacturers, wholesalers, shippers, and retailers from advertising the price of any alcoholic beverage, with the single exception of signs or tags attached to "merchandise for sale within the licensed premises." R.I. Gen. Laws §3-8-8.1 bars media in Rhode Island from publishing any liquor price advertising or otherwise "mak[ing] reference to the price of any alcoholic beverages." The statutes thus prevent out-of-state wholesalers, retailers, manufacturers or distributors from communicating price information through Rhode Island media outlets, and shield higher-cost Rhode Island liquor stores from competition by depriving consumers of any but on-site information about

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

comparative prices.[2] Rhode Island defends the laws as attempts to prevent price wars and thereby reduce excessive liquor consumption.

In the district court, plaintiffs' experts testified that there was no empirical evidence that price advertising affects alcohol consumption. Rhode Island, for example, has a comparatively high level of alcohol consumption, while many states that allow price advertising have lower drinking rates. *44 Liquormart, Inc. v. Racine*, 829 F.Supp. at 546-48.[3] One of the plaintiffs' experts explained that,

> because price advertising is only one part of the total advertising phenomenon, there is no reason to believe that a change in that factor alone would have much of an impact on levels of consumption.

Id. at 546. The other plaintiffs' expert concurred that price advertising had no known effect on consumption or temperance. *Id.* at 547. The district court credited this testimony, while finding that the government's expert was not persuasive and presented no relevant testimony on the effect of price advertising.[4]

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[2] One in-state and one out-of-state corporation joined as plaintiffs to challenge the statutes. The Rhode Island Liquor Stores Association intervened as a defendant to represent the interests of small retail liquor stores. *44 Liquormart, Inc. v. Racine*, 829 F.Supp. 543, 545 (D.R.I. 1993), *rev'd sub nom. 44 Liquormart, Inc. v. Rhode Island*, 39 F.3d 5 (1st Cir. 1994), *cert. granted*, 115 S.Ct. 1821 (1995).

[3] By contrast, there was some evidence that "overall alcohol advertising [*i.e.*, not price advertising] has a slight effect on alcohol consumption." 829 F.Supp. at 546.

[4] This defense expert discussed an international study comparing countries that allow liquor advertising and those that do not. The countries (continued...)

The district court found that Rhode Island had not met its burden of justifying the price advertising ban under the second and third parts of the test set forth in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 564 (1980), for evaluating the constitutionality of burdens on commercial speech.[5] As to the second *Central Hudson* factor, the government did not show that Rhode Island's statutes directly advance the governmental interest asserted, *44 Liquormart*, 829 F.Supp. at 551; and as to the third, Rhode Island did not show that the price ban was "not more extensive than is necessary to serve that interest." *Id.*[6]

The district court rejected arguments that the Twenty-first Amendment permitted states to infringe constitutionally

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[4] (...continued)
that banned broadcast advertising of alcohol were found to have lower liver cirrhosis, mortality, and motor vehicle fatality rates. The district court found that the study did not consider numerous variables that might account for these correlations; there was not even any indication whether the motor vehicle death rates were alcohol-related. *Id.* at 548-49. Moreover, the study did not relate to price advertising but to alcohol advertising generally.

[5] In *Florida Bar v. Went For It, Inc.*, __ U.S. __, 63 U.S.L.W. 4644, 4646 (June 21, 1995), the Court described the *Central Hudson* test as having "three related prongs"; previously, the Court had referred to a four-part test. Throughout this brief, we have adopted the "three-part" language of the *Florida Bar* opinion.

[6] The court recognized that the third *Central Hudson* factor has been modified somewhat to require a reasonable "fit" between the regulation and achievement of the government's goal. *Id.* at 554. *See Edenfield v. Fane*, 507 U.S. __, __, 113 S.Ct. 1792, 1798 (1993)(laws restricting commercial speech "need only be tailored in a reasonable manner to serve a substantial state interest in order to survive First Amendment scrutiny"). *See also Florida Bar v. Went For It, Inc.*, 63 U.S.L.W. at 4648 ("Of course, we do not equate this fact with the less rigorous obstacles of rational basis review").

protected expression pursuant to their liquor licensing powers, or otherwise required "a shift in both the level and allocation of the traditional burden of proof" in commercial speech cases. *Id.* The court also distinguished two circuit court decisions that had upheld wholesale bans on liquor advertising, *Oklahoma Telecasters Ass'n v. Crisp*, 699 F.2d 490 (10th Cir. 1983), *rev'd on other grounds sub nom. Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984); and *Dunagin v. Oxford*, 718 F.2d 738 (5th Cir. 1983)(*en banc*), *cert. denied*, 467 U.S. 1259 (1984), and rejected the state's argument that this Court's summary affirmance in *Queensgate Investment Co. v. Liquor Control Comm'n*, 459 U.S. 807 (1982), mandated approval of Rhode Island's price advertising laws. *44 Liquormart*, 829 F.Supp. at 553.

The First Circuit reversed. The appellate court accepted the government's and intervenors' argument for a more lenient standard of review based on the state's Twenty-first Amendment powers. *44 Liquormart, Inc. v. State of Rhode Island*, 39 F.3d at 7. Although purporting to follow simply a relaxed version of the *Central Hudson* test, the First Circuit essentially reduced the level of scrutiny to a generalized standard of "reasonableness"[7] and, ignoring the district court's factual findings,[8] found the statutes "reasonably" related to the goal of temperance. The First Circuit did note a significant Commerce Clause concern with the laws' discrimination against out-of-state sellers, observing that the retailer/intervenors' argument that "the statute protects the small vendor from the giants . . . might not be a lawful use of the Twenty-First Amendment." *Id.* at 8. The court of

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[7] The court also relied on *Posadas de Puerto Rico Assoc. v. Tourism Co.*, 478 U.S 328, 342 (1986), for its use of a "reasonableness" test. 39 F.3d at 7-8.

[8] The court of appeals implied that the expert testimony went "both ways." *See* 39 F.3d at 7.

appeals deemed the Commerce Clause argument waived, however, and so did not resolve this issue. *Id.* at 9.

This Court granted *certiorari* on May 1, 1995.

SUMMARY OF ARGUMENT

The public's First Amendment interest in truthful price information does not depend on whether the information is packaged as "commercial" or "noncommercial" speech. Under our system of free expression, government should not be in the paternalistic business of attempting to control citizens' behavior by depriving them of accurate information. Thus, under this Court's well-established precedents, there is no basis for applying a relaxed standard of First Amendment scrutiny to Rhode Island's ban on truthful price advertising.

In particular, the First Circuit erred by relying on *Posadas de Puerto Rico*, 478 U.S. 328, to justify diminished First Amendment protection simply because the state seeks to discourage use of the product being advertised, or even has the power to outlaw it entirely. As this Court has strongly suggested in its most recent reference to *Posadas*, the state's "greater" power to ban an activity does *not* include the "lesser" power to silence ideas and information about it. This case presents the Court with an opportunity, therefore, expressly to disavow the overly broad language in *Posadas* that has brought unnecessary confusion to this area of the law.

Similarly, the Twenty-first Amendment does not provide a basis for diminished First Amendment scrutiny in the context of this case. The Twenty-first Amendment permits states to outlaw alcohol or regulate its distribution to an extent that otherwise might offend the Commerce Clause. It does not trump or diminish other constitutional provisions,

particularly the individual freedoms found in the Bill of Rights.

Finally, Rhode Island has not met its burden of justifying the price advertising ban under this Court's *Central Hudson* test for suppression of commercial speech. Its interest in controlling citizens' behavior by denying them truthful information is not only not substantial, it is illegitimate. Moreover, Rhode Island has not shown that the ban directly advances its stated goal of promoting temperance. *A fortiori*, it has not shown that the goal is served by methods that are reasonably tailored to achieve the desired ends. Indeed, the only goal demonstrably accomplished by the ban is to protect high-cost Rhode Island retailers from price competition.

ARGUMENT

I. LAWS THAT PATERNALISTICALLY DENY CITIZENS TRUTHFUL PRICE INFORMATION IN ORDER TO INFLUENCE OR CONTROL BEHAVIOR VIOLATE THE FIRST AMENDMENT

A. The First Amendment Interest In Receiving Truthful Information Is The Same Regardless Of Whether The Information Is Supplied In The Context Of Commercial Or Noncommercial Speech

Although this case involves advertising, the public interest in receiving truthful product information transcends the sometimes too rigid division between commercial and noncommercial speech. In *Cincinnati v. Discovery Network, Inc.*, 507 U.S. __, __, 113 S.Ct. 1505, 1511 (1993), this Court recognized the limitations of the commercial/noncom-

mercial distinction, and thus rejected Cincinnati's argument that the advertising fliers it sought to restrict had "only a low value." Cincinnati's attempt to distinguish between newspapers and commercial fliers, said the Court,

> attaches more importance to the distinction between commercial and noncommercial speech than our cases warrant and seriously underestimates the value of commercial speech.

Id. As the Court noted, the newspapers that Cincinnati favored in its newsrack distribution scheme and the fliers that it disfavored had much content in common. Furthermore, consumers had a similar interest in receiving both types of material. *Id.* at 1511-12 & n.17. Under the circumstances, the Court held, and Justice Blackmun emphasized in a separate concurring opinion, the distinction between commercial and noncommercial speech is not enough, by itself, to deprive consumers of truthful and non-misleading information. *Id.* at 1515 n.21 and 1517 (Blackmun, J., concurring).[9]

The seminal decision in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), explains why the First Amendment obstacles to government suppression of truthful price information (in that case, about prescription drugs) should not vary depending on whether the speaker's motivation is or is not commercial. Certainly, said the Court, the consumer's interest in commercial information "may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *Id.* at 763.[10]

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[9] *Cf. Bolger v. Young Drug Products Corp.*, 463 U.S. 60, 71-72 (1983) (the "distinction between commercial and noncommercial speech" does not justify the suppression of speech based on offensiveness).

[10] Indeed, even though the state has a strong interest in seeing that drugs

(continued...)

> So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.

Id. at 765.

The Court reiterated this concern with the free flow of truthful information in *Bates v. State Bar of Arizona*, 433 U.S. 350, 364-65 (1977)(rejecting the state's "paternalistic" approach that suppresses information in an effort to control consumer choices); *Central Hudson*, 447 U.S. at 561-62 ("[c]ommercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information"); and *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978)("[a] commercial advertisement is constitutionally protected not so much because it pertains to the seller's business as because it furthers the societal interest in the 'free flow of commercial information'")(quoting *Virginia Pharmacy*, 425 U.S. at 764). In *Rubin v. Coors Brewing Co.*, __ U.S. __, __, 115 S.Ct. 1585, 1589 (1995), the Court recently reaffirmed the importance of "'the free flow of commercial information'" and repeated the observation of *Virginia Pharmacy* that the citizen's interest in such information "'may be as keen, if not keener by far, than his interest in the day's most urgent political debate.'"[11]

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[10] (...continued)
are not abused, accurate price information can make the difference between health and sickness to many Americans. *Id.* at 763-64.

[11] *Florida Bar v. Went For It, Inc.*, 63 U.S.L.W. 4644, which upheld a (continued...)

Indeed, the *Virginia Pharmacy* principle is fundamental to the First Amendment, and has been cited in the context of noncommercial speech as well. For example, *United States v. National Treasury Employees Union*, 513 U.S. __, __, 115 S.Ct. 1003, 1014 (1995), in striking down a statute creating disincentives to government employees' expression, noted that the law also significantly burdened the public's right to read and hear. In *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 223 (1989), a ban on primary endorsements was held to hamstrings voters; the Court noted that such a "highly paternalistic approach" to what people may hear is generally suspect. *See also City of Ladue v. Gilleo*, 512 U.S. __, __, 114 S.Ct. 2038, 2042 (1994)(town may not achieve its goal by restricting free flow of information)(citing *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85 (1977)).

The real First Amendment stake in cases involving truthful advertising is thus the public's right to receive information.[12] That right is the same regardless of whether

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[11] (...continued)
30-day ban on lawyer advertising directed at accident victims and their families, does not undermine the validity of this general principle. In *Florida Bar*, the Court stressed the state's historic role in regulating the legal profession. As Justice O'Connor explained in her majority opinion, "[t]here is an obvious difference between situations in which the Government acts in its own interests, or on behalf of entities it regulates, and situations in which the Government is motivated primarily by paternalism." *Id.* at 4648 n.2.

[12] *See generally Board of Education, Island Trees School Dist. v. Pico*, 457 U.S. 853, 866-67 (1982), *id.* at 911-13 & nn.6 & 7 (Rehnquist, J., dissenting); *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *Lamont v. Postmaster General*, 381 U.S. 301, 308 (1965)(Brennan, J., concurring); Note, "Constitutional Protection of Commercial Speech," 82 Colum.L.Rev. 720, 730-36 (1982).

the information is reported in newspaper articles, consumer surveys, or commercial advertisements. Indeed, Rhode Island's statutory scheme attacks the right to receive information regardless of whether it comes in a commercial or noncommercial package: §3-8-8.1 flatly bars the media from "mak[ing] reference to the price of any alcoholic beverage." Such a ban on truthful product information cannot be justified under the First Amendment.[13]

In *Rubin v. Coors Brewing Co.*, 115 S.Ct. 1585, Justice Stevens explained why the usual justifications for affording diminished First Amendment protection to commercial speech do not apply to truthful, non-misleading information. The alcohol content information involved in *Coors* was the same whether it appeared on a product label or in the report of a nonprofit consumer protection group. *Id.* at 1595 (Stevens, J., concurring). Depriving people of the information did not serve any of the purposes that ordinarily justify relaxed constitutional scrutiny of commercial speech (*e.g.*, potential for undue influence or deception). *Id.* at 1596. In short,

> [a]ny "interest" in restricting the flow of accurate information because of the perceived danger of that knowledge is anathema to the First Amendment; more speech and a better-informed citizenry are among the central goals of the Free Speech Clause. Accordingly, the Constitution is most skeptical of supposed state interests that seek to keep people in the dark

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[13] To the extent that §3-8-8.1 bars noncommercial references "to the price of any alcoholic beverage," it is unconstitutional under the traditional strict scrutiny test for government regulation that targets speech based on its content. *Simon & Schuster v. Members of the New York State Crime Victims Board*, 502 U.S. 105, 115-118 (1991).

> for what the government believes to be their own good.

Id. at 1597 (citations omitted).

In short, a government decision to suppress truthful information in order to control the behavior of citizens is highly suspect under the First Amendment. Paternalistic suppression of ideas or information because of the presumed "dangerous" effect that such expression may have on human behavior is a constitutional anathema in the context of non-commercial speech, *see, e.g., Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969); *Whitney v. California*, 274 U.S. 357, 375-77 (1927)(Brandeis, J., concurring), and has been condemned in commercial speech cases as well. As Justice Blackmun explained in *Central Hudson*,

> I seriously doubt whether suppression of information concerning the availability and price of a legally offered product is ever a permissible way for the State to "dampen" demand for or use of the product. Even though "commercial" speech is involved, such a regulatory measure strikes at the heart of the First Amendment. This is because it is a covert attempt by the State to manipulate the choices of its citizens, not by persuasion or direct regulation, but by depriving the public of the information needed to make a free choice.

447 U.S. at 574-75 (Blackmun, J., concurring).

A strong argument can be made, therefore, that traditional First Amendment strict scrutiny should apply whenever the government deprives citizens of truthful information in order to influence or control their choices as consumers. Indeed, the Court in *Central Hudson* noted the weighty First Amendment arguments in favor of strictly

scrutinizing bans of truthful commercial information, even though it ultimately settled on a less exacting standard because of the "'commonsense' distinction between speech proposing a commercial transaction . . . and other varieties of speech." *Id.* at 562 (citation omitted). Because Rhode Island's ban is invalid even under the *Central Hudson* test generally applicable to commercial speech, *see* §III, *infra*, the Court need not revisit this question of heightened scrutiny in this case. Surely, however, there should be no dilution of the *Central Hudson* standard.

B. A State's Interest In Discouraging Harmful Activities, Including Its Power To Ban Such Activities, Does Not Justify The Suppression Of Truthful Information

Rhode Island argues that *Posadas de Puerto Rico*, 478 U.S. 328, and *United States v. Edge Broadcasting Co.*, 509 U.S. __, 113 S.Ct. 2696 (1993), permit states greater leeway in suppressing truthful advertising where the product or service is socially harmful and/or might constitutionally be banned. But this Court has already rejected an expansive interpretation of *Posadas* and *Edge* that would allow the paternalistic suppression of accurate information. *Rubin v. Coors*, 115 S.Ct. at 1589-90 n.2. Indeed, the Court in *Coors* limited *Posadas* to its primary holding that Puerto Rico's ban on casino advertising satisfied the *Central Hudson* test.

To the extent that it survives *Coors*, the broader language of *Posadas* should now be disavowed. Specifically, the Court should expressly reject the troublesome and idiosyncratic suggestion in *Posadas* that so long as a state may ban a disfavored activity entirely, then it is equally free to adopt the "less restrictive" option of imposing limits on speech that might promote the activity -- the so-called

"greater power includes the lesser" rationale. 478 U.S. at 346-47. As explained more fully below, this proposition is fundamentally incompatible with basic First Amendment principles and has contributed little to the development of First Amendment law. Read in context, moreover, the statement in *Posadas* on which Rhode Island so heavily relies was merely a response to the plaintiffs' argument that prior commercial speech cases[14] precluded Puerto Rico's ban on casino advertising. The Court distinguished the earlier decisions on the ground that they involved constitutionally protected activities, whereas gambling had no constitutional status and indeed could be banned.[15] In *Edge Broadcasting*, which also involved gambling, the Court explicitly declined to address the state's "greater includes the lesser" argument, and simply found that the statutes passed muster under the *Central Hudson* test. 113 S.Ct. at 2703.

A few examples from recent cases illustrate the fallacy of the "greater includes the lesser" reasoning, as applied to speech. In *Simon & Schuster v. Members of the New York State Crime Victims Board*, 502 U.S. 105, the Court invalidated a statute requiring that all proceeds earned from writings describing a crime, and written by persons accused or convicted of that crime, be turned over to a victims compensation board. Although New York could have imposed the "greater" burden of channeling *all* proceeds from crime to victim compensation, it could not constitutionally choose the "lesser" alternative of requisitioning only profits from First Amendment activity. *Id.* at 119-20. This principle, condemning content-based burdens on speech, is reflected in numerous other cases. *E.g.*, *Arkansas Writers' Project v.*

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[14] *Carey v. Population Services, Int'l*, 431 U.S. 678 (1977), and *Bigelow v. Virginia*, 421 U.S. 809 (1975).

[15] *See Posadas*, 478 U.S. at 345; *Rubin v. Coors*, 115 S.Ct. at 1589-90 n.2.

Ragland, 481 U.S. 221, 230 (1987)(state may tax commercial activities in general but may not single out publications for taxation on the basis of content); *Carey v. Brown*, 447 U.S. 455 (1980)(state may prohibit residential picketing in interests of privacy but may not single out nonlabor picketing). *Cf. Ladue v. Gilleo*, 114 S.Ct. at 2043 ("an exemption from an otherwise permissible regulation of speech may represent a governmental 'attempt to give one side of a debatable public question an advantage in expressing its views to the people'")(quoting *Bellotti*, 435 U.S. at 785-86).

In some contexts, such as nonpublic fora, content-based restrictions on speech are permitted but viewpoint discrimination is not. Thus, in *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 450 U.S. 37, 46 (1983), and *NAACP v. Cornelius*, 473 U.S. 788, 806 (1985), the Court upheld exclusions based on subject matter but only because they were viewpoint neutral. The greater power -- to exclude speech on certain subjects -- decidedly did not include the lesser -- to exclude only some speech on those subjects, depending on its viewpoint. Indeed, *R.A.V. v. City of St. Paul*, 505 U.S. __, 112 S.Ct. 2538 (1992), established that even a state's "greater power" to prohibit certain categories of speech entirely (such as fighting words or obscenity) does not include the "lesser power" to ban only some speech within those categories based on its viewpoint.

Similarly here, a state may choose to regulate liquor consumption in a variety of ways, undoubtedly including some regulation of advertising. But it may not suppress truthful information in an effort to deter citizens from engaging in legal conduct of which the state may disapprove.

If anything, the governmental interest in preventing harmful conduct was stronger in *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85 (1977), than in the so-called "vice" cases involving liquor or gambling. The dangers that

Willingboro sought to prevent -- racial segregation and blockbusting -- are not only socially harmful and repugnant, but are potential violations of the civil rights laws. *See id.* at 94-95. Yet Justice Marshall, writing for the Court, explained that government could not constitutionally seek to avert these dangers by suppressing "the free flow of truthful information." *Id.* at 95.

> If dissemination of this information can be restricted, then every locality in the country can suppress any facts that reflect poorly on the locality, so long as a plausible claim can be made that disclosure would cause the recipients of the information to act "irrationally." *Virginia Pharmacy Bd.* denies government such sweeping powers. As we said there in rejecting Virginia's claim that the only way it could enable its citizens to find their self-interest was to deny them information that is neither false nor misleading:
>
> "There is . . . an alternative to this highly paternalistic approach. That alternative is to assume this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them . . . . But the choice among these alternative approaches is not ours to make or the Virginia General Assembly's. It is precisely this kind of choice, between the dangers of suppressing information and the dangers of its misuse if it is freely available, that the First Amendment makes for us."

Id. at 96-97 (quoting *Virginia Pharmacy*, 425 U.S. at 770).

In a system that values free expression, creating a lenient First Amendment standard simply because the state seeks to deter conduct it deems harmful is unjustifiably paternalistic and weighs the free speech scales too heavily in favor of suppression. Under *Central Hudson*, the state must at the outset "assert a substantial interest to be achieved" by its restriction on commercial speech. 447 U.S. at 564. Here, Rhode Island's interest in reducing alcohol consumption is admittedly substantial, though its interest in doing so by denying the public truthful information is illegitimate. *See* §III, *infra*. Certainly, it is not necessary or wise to give Rhode Island three bites at the apple by factoring the "socially harmful" nature of the conduct into the equation again by eviscerating the second and third parts of the *Central Hudson* test.

II. THE TWENTY-FIRST AMENDMENT DOES NOT PERMIT GOVERNMENT SUPPRESSION OF TRUTHFUL ALCOHOL PRICE INFORMATION OR JUSTIFY ANY WEAKENING OF FIRST AMENDMENT SCRUTINY

The Twenty-first Amendment created a limited exception to the Commerce Clause, permitting the states to ban or regulate the distribution of alcohol within their borders. *Hostetter v. Idelwild Liquor Corp.*, 377 U.S. 324, 330-32 (1964); *Ziffrin v. Reeves*, 308 U.S. 132, 138-39 (1939). Even with respect to the Commerce Clause, however, a state's authority is far from absolute, *see Hostetter*, 377 U.S. at 332; *Healy v. The Beer Institute*, 491 U.S. 324, 341-42 (1989), and the Amendment gives the states no power to encroach on other constitutional provisions. *See Capital Cities Cable, Inc. v. Crisp*, 467 U.S. at 711-16 (Twenty-first Amendment does not permit state ban on liquor advertising that violates Supremacy Clause); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 122 n.5 (1982)(state "may not exercise

its power under the Twenty-first Amendment in a way which impinges upon the Establishment Clause"); *California Retail Liquor Dealers v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106-10 (1980)(Twenty-first Amendment does not immunize state pricing scheme from antitrust liability); *Craig v. Boren*, 429 U.S. 190, 204-09 (1976)(state may not rely on Twenty-first Amendment to justify sex discrimination in regulation of liquor sales); *Wisconsin v. Constantineau*, 400 U.S. 433, 436 (1971)(Twenty-first Amendment does not excuse violation of due process in posting name of alleged excessive drinker). As the Court made clear in *Craig*:

> Once passing beyond consideration of the Commerce Clause, the relevance of the Twenty-first Amendment to other constitutional provisions becomes increasingly doubtful. As one commentator has remarked, "Neither the text nor the history of the Twenty-first Amendment suggests that it qualifies individual rights protected by the Bill of Rights and the Fourteenth Amendment where the sale or use of liquor is concerned" . . . . Any departures from this historical view have been limited and sporadic.

429 U.S. at 206 (quoting Paul Brest, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 258 (1975)); *see also Capital Cities v. Crisp*, 467 U.S. at 712 ("our prior cases have made clear that the Amendment does not license the States to ignore their obligations under other provisions of the Constitution").

Rhode Island relies upon *California v. LaRue*, 409 U.S. 109 (1972), and *New York State Liquor Authority v. Bellanca*, 452 U.S. 714 (1981)(*per curiam*), to argue that the Twenty-first Amendment gives it broad authority to censor speech related to the consumption of alcohol. The focus in

LaRue, however, was almost entirely on conduct, not expression: the "gross sexuality" that the record amply showed had repeatedly occurred when liquor mixed with sexual entertainment. 409 U.S. at 118. The *per curiam* decision in *Bellanca* did contain broad language asserting that:

> Whatever artistic or communicative value may attach to topless dancing is overcome by the State's exercise of its broad powers arising under the Twenty-first Amendment.

452 U.S. at 718. But this language was not necessary to the result in *Bellanca*, which like *LaRue* essentially upheld a regulation of sexual conduct on licensed premises.

The *LaRue* and *Bellanca* line of cases[16] address a narrow and unique police problem that arises when sexual entertainment is combined with alcohol consumption. They cannot be understood to authorize state regulation of First Amendment-protected expression simply because the speech takes place in saloons: political discussions, for example, even if mixing liquor and politics sometimes proves incendiary.[17] Still less do they justify a ban on truthful information, which has no element of conduct, sexual or otherwise, and does not even occur on licensed premises. Certainly *LaRue* and *Bellanca* cannot be stretched to authorize general encroachments on speech simply because liquor

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[16] *See also City of Newport v. Iacobucci*, 479 U.S. 92 (1986); *id.* at 103 (Stevens, J., dissenting)("the Court is quite wrong in proceeding as if the Twenty-first Amendment repealed not only the Eighteenth Amendment, but some undefined portion of the First Amendment as well").

[17] *Cf.* James Joyce, ULYSSES 394-449 (Bodley Head ed. 1960)(scene at Barney Kiernan's pub in which "the citizen," inebriated, attacks Bloom after an argument about Irish history, patriotism, and anti-Semitism).

consumption is somehow involved. The Court should repudiate any language in these cases that suggests otherwise.[18]

In *Barnes v. Glen Theatre, Inc.*, 501 U.S. __, 111 S.Ct. 2456 (1991), a plurality of this Court explained that nude dancing, absent any serious artistic element, has only "marginal" First Amendment protection, *id.* at 2460,[19] and that states may regulate it pursuant to their general police power. There was no need for special reference to state power under the Twenty-first Amendment. Justice Souter's concurrence, the narrowest ground on which *Barnes* was decided, would permit regulation of nude entertainment because of its presumed adverse secondary effects, *id.* at 2468. Given *Barnes*, there is no necessity to stretch the Twenty-first Amendment beyond its purposes or language simply to establish government's acknowledged power to regulate public displays of sexual conduct. Accordingly, the Court should reiterate the holdings of *Craig* and *Crisp* and clarify that the Twenty-first Amendment does not authorize otherwise impermissible encroachments on First Amendment rights.

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[18] It follows that lower court decisions relying on *LaRue* and *Bellanca* to uphold liquor advertising bans should also be repudiated. See *Oklahoma Telecasters Ass'n v. Crisp*, 699 F.2d 490 (10th Cir. 1983), *rev'd on other grounds sub nom. Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984), and *Dunagin v. Oxford*, 718 F.2d 738 (5th Cir. 1983)(*en banc*), *cert. denied*, 467 U.S. 1259 (1984). The better reasoned case is *Michigan Beer & Wine Wholesalers Ass'n v. Michigan Liquor Control Comm'n*, 370 N.W.2d 328, 335 (Mich.Ct.App.1985): it distinguishes *LaRue* and *Bellanca* because they simply upheld regulation of liquor distribution, not "suppression of constitutionally protected expression"; and found Michigan's ban on price advertising unjustified because there was no known correlation between consumption and prices. 370 N.W.2d at 336.

[19] "[T]he barest minimum," as the Court implied as long ago as *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975).

III. RHODE ISLAND'S BAN ON TRUTHFUL PRICE ADVERTISING IS UNCONSTITUTIONAL UNDER THE *CENTRAL HUDSON* TEST

Under *Central Hudson* and its progeny, the government bears the burden of proving both that an infringement of commercial speech directly advances a substantial state interest, and that it is no more extensive than necessary to serve that interest. 447 U.S. at 564; *Rubin v. Coors*, 115 S.Ct. at 1798; *Edenfield v. Fane*, 113 S.Ct. at 1798. This is not a strict "least restrictive means" test, but it is also far from toothless: it requires the state to *prove* that the means chosen directly advance and are "narrowly tailored to achieve the desired objective." *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 480 (1989).[20] The regulation "may not be sustained if it provides only ineffective or remote support for the government's purpose," and the state's burden "is not satisfied by mere speculation or conjecture." *Edenfield*, 113 S.Ct. at 1800 (citation omitted); *Coors*, 115 S.Ct. at 1592.

Rhode Island manifestly has not met its burden here. First, although reducing alcohol consumption is surely a substantial state interest, controlling behavior by suppressing speech is not. Because paternalistic efforts to manipulate citizen choices through censorship are so antithetical to First Amendment principles, *see* §IA, *supra*, Rhode Island's interest here is not only not substantial, it is illegitimate.

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[20] For the reasons stated in §II, *supra*, and contrary to the Rhode Island Supreme Court's decisions in *Rhode Island Liquor Stores Ass'n v. The Evening Call*, 497 A.2d 331 (R.I. 1985), and *S & S Liquor Mart, Inc. v. Pastore*, 497 A.2d 729 (R.I. 1985), the burden of proof does not shift simply because the subject of the advertising is liquor.

Even assuming that Rhode Island may escape this impediment by raising the level of abstraction and describing its interest as simply deterring excessive alcohol use, it has not satisfied the second and third prongs of the *Central Hudson* test. The district court found that the state presented no evidence that the price advertising ban directly advanced Rhode Island's interest or, indeed, had any effect on alcohol consumption. *Compare Florida Bar v. Went For It, Inc.*, 63 U.S.L.W. at 4646-47. And plaintiffs' evidence established precisely the contrary.[21] The only apparent effect of the ban is to protect high-priced in-state retailers from price competition. As Justice Murray pointed out, dissenting in one of the two Rhode Island Supreme Court decisions upholding the ban,

> The underlying motives of this case have nothing to do with the "promotion of temperance" among Rhode Island citizens, but rather with the promotion of price ignorance. The [Rhode Island Liquor Stores Association] seeks to retain its members' market share by withholding price information from Rhode Island citizens.

Rhode Island Liquor Stores Ass'n v. The Evening Call, 497 A.2d at 342 (Murray, J., dissenting).

Because Rhode Island had not shown that its price advertising ban directly advances its stated goal, *a fortiori* it has not met its burden of proving the ban is narrowly tailored. The court of appeals implicitly acknowledged that

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[21] The state suggests that liquor consumption, although higher in Rhode Island than in many states without price advertising bans, might be higher still without the ban. This is mere speculation and hardly amounts to affirmative evidence that the ban directly advances the goal of temperance in a narrowly tailored manner.

Rhode Island had not satisfied the second and third prongs of *Central Hudson*, and only reversed because it believed that a much looser test applied where the state was censoring speech in order to discourage "harmful" activity.

Rhode Island has other, constitutionally nonproblematic options available if it seriously wishes to discourage excessive liquor consumption. It may embark on a health and safety campaign of the type that was so effective in the 1960s, in the context of cigarette advertising, that it persuaded the tobacco industry to abandon broadcast commercials entirely. *See Capital Broadcasting Co. v. Mitchell*, 333 F.Supp. 582, 587-90 (D.D.C. 1971)(three-judge court) (Wright, J. dissenting), *sum. aff'd*, 405 U.S. 1000 (1972) (explaining how tobacco industry lobbied for ban on broadcast advertising after FCC rulings requiring equal access for anti-smoking ads succeeded in dramatically reducing tobacco sales). It may impose heavy sales taxes on liquor or otherwise make the cost of consumption high through pricing schemes that are sufficiently state-dominated to be immunized from antitrust law.[22] Here, as in *Coors*, "the availability of these options, all of which could advance the government's asserted interest in a manner less intrusive to [plaintiff's] First Amendment rights, indicates that [the challenged statute] is more extensive than necessary." 115 S.Ct. at 1593-94. What Rhode Island may not do under the First Amendment is suppress truthful price information because it considers the information dangerous. *Cf. Speiser v. Randall*, 357 U.S. 513, 519 (1958)(restrictions on government benefits may not be "aimed at the suppression of dangerous ideas"); *Regan v. Taxation with Representation*, 461 U.S. 540, 548 (1983)(same).

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[22] *See California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980)(state's liquor pricing scheme violated Sherman Act because it delegated decisionmaking to private industry).

CONCLUSION

The First Amendment condemns suppression of truthful information in the interests of controlling citizen behavior. A state that wishes to discourage harmful activities like excessive drinking has many options open to it that would directly advance its goal without engaging in the speculative and constitutionally dubious practice of censoring speech. The judgment of the court of appeals should therefore be reversed.

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Dated: July 3, 1995

(8)

No. 94-1140

SUPREME COURT, U.S.
FILED
JUL 5 1995
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

44 LIQUORMART, INC.,

Petitioner,

—v.—

THE STATE OF RHODE ISLAND *ET. AL.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF *AMICI CURIAE* IN SUPPORT OF PETITIONER SUBMITTED BY THE ASSOCIATION OF NATIONAL ADVERTISERS, INC.; THE NATIONAL ASSOCIATION OF BROADCASTERS; AND THE AMERICAN ASSOCIATION OF ADVERTISING AGENCIES

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41 pp

TABLE OF CONTENTS

PAGE

Interest of Amici Curiae 1

Introductory Statement and Summary of Argument ... 3

Statement of the Case 6

I. CENSORSHIP OF TRUTHFUL INFORMATION ABOUT PRICES MAY NOT BE USED AS AN INDIRECT METHOD OF IMPOSING PRICE CONTROL 9

A. Rhode Island's Use of Censorship to Impose *De Facto* Price Control Bypasses the Democratic Process and Suppresses Information Needed to Form an Important Political Judgment 9

B. The 21st Amendment Does Not Empower Rhode Island to Use Censorship to Fix Prices 13

C. The "Greater" Power to Ban Alcohol Does Not Carry With It a So-Called "Lesser Power" to Ban Truthful Speech About Prices 15

II. RHODE ISLAND'S EFFORT TO DENY CONSUMERS ACCURATE INFORMATION ABOUT A PRODUCT THEY ARE ABOUT TO BUY VIOLATES THE COMMERCIAL SPEECH DOCTRINE 17

A. Consumers Have a First Amendment Right to Uncensored Information About the Lawful Products They Are About to Buy 18

PAGE

B. Rhode Island Has Not Asserted an Interest of Sufficient Magnitude to Override the Consumer's Right to Know 20

C. Rhode Island Has Not Demonstrated That Its Censorship Scheme Will Directly and Materially Reduce the Irresponsible Consumption of Alcohol..... 24

D. The Scope of Rhode Island's Censorship Program Is Far Broader Than Necessary 29

CONCLUSION..... 30

TABLE OF AUTHORITIES

Cases	PAGE
Abrams v. United States, 250 U.S. 616 (1919)	27
Adkins v. Children's Hospital, 261 U.S. 525 (1923)	9
Arnett v. Kennedy, 416 U.S. 134 (1974)	16
Barnes v. Glen Art Theater, 501 U.S. 560 (1991)	15
Bates v. State Bar of Arizona, 433 U.S. 350 (1977)	11, 19
Bigelow v. Virginia, 421 U.S. 809 (1975)	10, 17
Bloom v. O'Brien, 841 F.Supp. 277 (D. Minn. 1993)	12
Board of Trustees, State Univ. of N.Y. v. Fox, 492 U.S. 469 (1989)	3, 20, 23, 29
Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983)	3, 19
Brandenburg v. Ohio, 395 U.S. 444 (1969)	27
Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573 (1986)	14
California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980)	14
California v. LaRue, 409 U.S. 109 (1972)	15
Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984)	13, 14
Carey v. Population Services, Int'l., 431 U.S. 678 (1977)	18, 19, 28
Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 U.S. 557 (1980)	*passim*

PAGE

Church of the Lukumi Babalu Aye v. City of Hialeah, 113 S.Ct. 2217 21

Cincinnati v. Discovery Network, Inc., 113 S.Ct. 1505 (1993) 3, 5, 26, 28

Citizens Against Rent Control/Coalition for Fair Housing v. Berkley, Cal., 454 U.S. 290 (1981) ... 4, 8

City of Newport, Ky. v. Iacobucci, 479 U.S. 92 (1986) 15

Clark Distilling Co. v. Western Md. Ry., 212 U.S. 311 (1917) 13

Cleveland Board of Education v. Loudermill, 470 U.S. 523 (1985) 16

Consolidated Edison Co. of New York v. Public Service Comm'n, 447 U.S. 530 (1980) 10

Craig v. Boren, 429 U.S. 190 (1976) 14

Dunagin v. City of Oxford, Mississippi, 718 F2d 738 (5th Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984) 13

Edenfield v. Fane, 113 S.Ct. 1792 (1993).....*passim*

Edwards v. California, 314 U.S. 160 (1941)..... 14

F.C.C. v. Beach Communications, Inc., 113 S.Ct. 2096 (1993) 5, 26

F.C.C. v. League of Women Voters, 468 U.S. 221 (1984) 16

First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978) 10

Fisher v. City of Berkeley, Cal., 475 U.S. 260 (1986) . 9

PAGE

Florida Bar v. Went for It, Inc., 1995 WL 365648 (U.S.) 20, 22, 23, 28

Friedman v. Rogers, 440 U.S. 1 (1979) 20

Gilbert v. Minnesota, 254 U.S. 325 (1920) 27

Gitlow v. New York, 268 U.S. 652 (1925) 27

Gold v. DiCarlo, 380 U.S. 520 (1965) 9

Harry & Bryant Co. v. FTC, 726 F2d 993 (4th Cir.), *cert. denied*, 469 U.S. 820 (1984) 12

Healy v. The Beer Institute, 491 U.S. 324 (1989) 14

Houston E. & W. Texas Ry. Co. v. United States, 234 U.S. 342 (1914) 9

Ibanez v. Florida Board of Accountancy, 114 S.Ct. 2084 (1994) 19, 25, 26, 28

In re R.M.J., 455 U.S. 191 (1982) 19

Kent v. Dulles, 357 U.S. 116 (1957) 10

Lamont v. Postmaster General, 381 U.S. 301 (1965).. 4

Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982) ... 14

Leisy v. Hardin, 135 U.S. 100 (1890) 13

Linmark Associates, Inc. v. Willingboro Tp., 431 U.S. 85 (1977) 18, 19, 28

Lopez v. United States, 63 U.S.L.W. 4343 (1995) 25

Louisiana Consumers League, Inc. v. Louisiana State Board of Optometry Examiners, 557 F.2d 473 (5th Cir. 1977) 12

Lowe v. S.E.C., 472 U.S. 181, (1985) 10

PAGE

Michigan Beer & Wine Wholesalers Ass'n v. Attorney General of Michigan, 142 Mich. App. 294, 370 N.W. 2d 328 (1985), *cert. denied*, 479 U.S. 939 (1986) 12

Motor Vehicle Mfgs. Assoc. v. Abrams, 684 F.Supp. 804 (S.D.N.Y. 1988), *rev'd in part*, 899 F.2d 1315 (2d Cir. 1990), *cert. denied*, 499 U.S. 912 (1991) 12

Mt. Healthy School District v. Doyle, 429 U.S. 274 (1977) 4, 21

Munn v. Illinois, 94 U.S. 113 (1877)..... 9

Nebbia v. New York, 291 U.S. 502 (1934) 9

New York State Liquor Authority v. Bellanca, 452 U.S. 714 (1981) 15

New York Times v. Sullivan, 376 U.S. 254 (1964) 17

Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978) 3, 20, 23

Oklahoma Telecasters Ass'n v. Crisp, 699 F.2d 490 (10th Cir. 1983) 13

Olsen v. Nebraska, 313 U.S. 236 (1941)..... 9

Peel v. Attorney Registration and Disc. Comm'n, 496 U.S. 91 (1990) 19, 29

Pennsylvania State Police v. Hospitality Investments of Philadelphia, Inc., 650 A.2d 854 (Pa. 1994) .. 13

People v. Mobil Oil Corp., 48 N.Y.2d 192, 422 N.Y.S. 33, 397 N.E. 2d 794 (1979) 12

Phoenix Mutual life Insurance Co. of New York v. Insurance Department, 500 F.Supp. 2 (S.D.N.Y. 1980) 12

PAGE

Pierce v. United States, 252 U.S. 239 (1920) 27

Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973) 19

Posadas de Puerto Rico Associates v. Tourism Co., 478 U.S. 328 (1986) 16, 22

Queensgate Investing Co. v. Liquor Control Comm'n, 69 Ohio St. 2d 361, 433 N.E.2d 138, app. *dismissed*, 459 U.S. 807 (1982) 12-13

R.A.V. v. City of St. Paul, 112 S.Ct. 2538 (1992) 5, 21

Rhode Island Liquor Stores Ass'n v. Evening Call Publishing Co., 497 A.2d 331 (R.I. 1985) 4, 7, 21

Ribnik v. McBride, 277 U.S. 350 (1928) 9

Rubin v. Coors Brewing Co., 115 S.Ct. 1585 ..... *passim*

S&S Liquor Mart, Inc. v. Pastore, 497 A.2d 729 (R.I. 1985) 7, 13

Sable Comunications, Inc. v. F.C.C., 492 U.S. 115 (1989) 25

Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) 10

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PAGE

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Turner Broadcasting Co. v. F.C.C., 114 S.Ct. 2445 (1994) 5, 24

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Wall & Ochs, Inc. v. Hicks, 469 F. Supp. 873 (E.D.N.Car. 1979)..... 12

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PAGE

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R.I. Gen. Laws 3-1-5 7

R.I. Gen. Laws 3-8-7 6

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1140

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44 LIQUORMART, INC.,

Petitioner,

—v.—

THE STATE OF RHODE ISLAND *ET. AL.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF *AMICI CURIAE* IN SUPPORT OF PETITIONER SUBMITTED BY THE ASSOCIATION OF NATIONAL ADVERTISERS, INC.; THE NATIONAL ASSOCIATION OF BROADCASTERS; AND THE AMERICAN ASSOCIATION OF ADVERTISING AGENCIES

Interest of Amici Curiae

The Association of National Advertisers, Inc., (A.N.A.), the National Association of Broadcasters (NAB), and the American Association of Advertising Agencies (A.A.A.A.) respectfully submit this brief *amici curiae* in support of petitioner. Written consents to its filing have been granted by the parties and filed with the Clerk of the Court.

The Association of National Advertisers, Inc., (A.N.A.), the advertising industry's oldest trade association, is the only organization exclusively dedicated to enhancing the ability of businesses to advertise on a national and regional basis. With more than 5,000 subsidiaries, divisions and operating units, A.N.A. members market a kaleidoscopic array of goods and services and account for a significant percentage of the nation's annual national and regional advertising expenditures. As the nation's principal community of commercial speakers, A.N.A. has long been committed to the advancement of truthful commercial speech designed to permit consumers to make informed and autonomous choices in the marketplace.

The National Association of Broadcasters (NAB), organized in 1922, is a non-profit incorporated trade association that serves and represents radio and television stations and networks. NAB seeks to preserve and enhance its members' ability to disseminate freely information concerning commercial activities, the activities of government and other matters of public concern. NAB and its members oppose the use of government censorship of truthful information about lawful activity as a tool to manipulate the behavior patterns of the American public.

The American Association of Advertising Agencies (A.A.A.A.) is the national trade association of the advertising agency industry, representing more than 650 advertising agencies throughout the United States. Members of A.A.A.A. create and place approximately 80% of all national advertisements, as well as significant portions of regional and local advertising. A.A.A.A. is dedicated to the preservation of a robust free market in commercial ideas.

Introductory Statement and Summary of Argument

I.

Serious constitutional questions are posed whenever a state seeks to impose price controls, even through democratic means. See *infra* at n.12. This case raises the related, and easier, question of whether censorship of truthful information about prices may be used to impose *de facto* price controls without full democratic discussion. Amici believe that government may never bypass the democratic process by using censorship as an indirect method of exercising its substantive powers.

Whatever merit differentiating between commercial and non-commercial speech may have in other contexts[1], *amici* believe that it would be wrong to do so in this case. For, while truthful price advertising clearly falls within the Court's technical definition of commercial speech[2], Rhode Island's censorship scheme does far more than merely interfere with a commercial transaction. Rather, it cloaks a controversial political judgment—whether or not to impose price controls—and screens the judgment from democratic review. Since, in politics, as in baseball, you can't hit what you can't see, Rhode Island's censorship scheme strikes at the heart of a citizen's right to know in its most deeply political sense. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 764-65 (1976). Accordingly, Rhode Island's attempt to ban truthful speech about prices should be

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[1] Justice Stevens has consistently warned that any effort to treat commercial speech differently from its non-commercial cousin should be based on a careful functional analysis of the justification for greater regulation. *Rubin v. Coors Brewing Co.*, 115 S.Ct. 1585, 1594-96 (Stevens, J. concurring).

[2] For efforts to define commercial speech, see *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978); *Central Hudson*, 447 U.S. at 561-566, and n.5; *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 66-68 (1983); *Board of Trustees, State Univ. of N.Y. v. Fox*, 492 U.S. 469, 473-75 (1989); and *Cincinnati v. Discovery Network, Inc.*, 113 S.Ct. 1505, 1511-13 (1993).

measured by stringent First Amendment norms designed to protect the political process. *Lamont v. Postmaster General*, 381 U.S. 301 (1965); *Citizens Against Rent Control/Coalition for Fair Housing v. Berkley, Cal.*, 454 U.S. 290 (1981).

II.

Measured under the commercial speech doctrine, moreover, Rhode Island's censorship scheme fails each prong of the *Central Hudson* test. It fails to advance a substantial governmental interest; fails to directly and materially advance the state's asserted interest in fostering temperance; and ignores less drastic means of advancing the state's interest.

A.

Although Rhode Island claims that its censorship scheme is designed to advance "temperance", which Rhode Island authorities equate with the responsible use of alcohol, substantial evidence exists that a desire to shield small *intra*-state retailers from price competition by larger stores is the statute's dominant purpose. See 39 F.3d at 7-8; *Rhode Island Liquor Stores Ass'n v. Evening Call Publishing Co.*, 497 A.2d 331, 335 (R.I. 1985); *Id* at 342 n.10 (R.I. 1985) (Murray, J., dissenting). Such an interest in economic protectionism does not qualify as "substantial" within the meaning of *Central Hudson*. Indeed, it violates the Commerce Clause. In light of the strong evidence of improper motive, including the candid admission by the Rhode Island State Liquor Association that economic protectionism is a significant goal of the statute, the First Circuit clearly erred in refusing to require Rhode Island to demonstrate that promotion of temperance is the statute's dominant purpose. *Mt. Healthy School District v. Doyle*, 429 U.S. 274 (1977) (presence of improper purpose places burden on censor to show that would have acted identically in absence of improper motive).

Moreover, even if one takes at face value Rhode Island's assertion that preventing irresponsible alcohol use is the statute's goal, Rhode Island does not have a legitimate interest in fostering its goals through state-mandated ignorance. *Rubin v. Coors Brewing Co.*, 115 S.Ct. 1585, 1596 (Stevens, J., concurring).

B.

Rhode Island has failed to demonstrate that censoring truthful information about prices will, in fact, materially diminish irresponsible alcohol consumption. *Edenfield v. Fane*, 113 S.Ct. 1792 (1993); *Rubin v. Coors Brewing Co.*, 115 S.Ct. 1585 (1995). Both lower courts found that, at most, Rhode Island has demonstrated a "reasonable" basis for hoping that banning price advertising will diminish alcohol consumption. 39 F.3d at 7-8; 829 F. Supp. at 549; 554.[3] While such a "reasonable" basis might be sufficient to regulate behavior, the essence of First Amendment protection obliges a would-be censor to do more than demonstrate that censorship is reasonable. *Turner Broadcasting Co. v. F.C.C.*, 114 S.Ct. 2445 (1994); *Edenfield v. Fane*, 113 S.Ct. 1792 (1993); *Cincinnati v. Discovery Network, Inc.*, 113 S.Ct. 1505 (1993). Compare *Wisconsin v. Mitchell*, 113 S.Ct. 2194 (1993) (regulating behavior) with *R.A.V. v. City of St. Paul*, 112 S.Ct. 2538 (1992) (regulating speech). See generally, *F.C.C. v. Beach Communications, Inc.*, 113 S.Ct. 2096, 2101 (1993). In order to carry its burden of justification, Rhode Island must, at a minimum, demonstrate that censorship of price advertising will, in fact, materially reduce irresponsible alcohol consumption. The courts below are in agreement that Rhode Island failed to make such a showing.

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[3] Indeed, the District Court found as a fact that the censorship scheme does not materially diminish alcohol consumption. 829 F.Supp. at 549.

C.

Finally, several alternatives exist that would minimize censorship. Most obviously, Rhode Island may attempt to regulate minimum price levels for alcohol openly, as it has already done for cigarettes.[4] See R.I. Gen. Laws, 6-13-2. More constructively, Rhode Island could seek to deal effectively with problem drinking by enacting serious measures providing for education, treatment and law enforcement. Rhode Island's failure to explain why such obvious non-censorship alternatives were ignored constitutes an independent ground for invalidating the statute. *Rubin v. Coors Brewing Co.*, 115 S.Ct. 1585, 1593-94 (1995).

Statement of the Case

Rhode Island attempts to regulate the retail prices of both cigarettes and beverages containing alcohol.[5] But, while cigarette price fixing is administered openly through legislation setting a minimum floor,[6] Rhode Island seeks to regulate beverage prices without the inconvenience of an open political debate. Instead, Rhode Island seeks to keep prices artificially high by forbidding retailers from disseminating truthful information to consumers about price.[7]

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[4] *Amici* believe that any effort to impose price control by democratic means would (and should) be soundly rejected by the people of Rhode Island, since it tampers with the market without meaningfully confronting problem drinking.

[5] The constitutionality of Rhode Island's substantive effort to regulate prices is not before the Court. Were Rhode Island to attempt to fix the price of beverages containing alcohol openly, it would raise serious questions under the Commerce Clause. The issue posed by this case is whether Rhode Island can bypass the democratic process by using censorship to achieve *de facto* price control.

[6] R.I. Gen. Laws 6-13-2.

[7] R.I. Gen. Laws 3-8-7, the statute at issue in this appeal, was enacted in 1956. See also, R.I. Gen. Laws 3-8-8.1, extending the ban on

Rhode Island claims that its price advertising ban is designed to keep retail cost artificially high in the hope of fostering "temperance".[8] While the word "temperance" is not defined in the statute, Rhode Island authorities apply it to mean the responsible use of alcohol, as opposed to the more extreme historical usage associated with complete prohibition.[9] The Rhode Island Liquor Store Association candidly admits that the censorship scheme is intended, as well, to insulate small retailers from price competition.[10] See *S&S Liquor Mart, Inc. v. Pastore*, 497 A.2d 729 (R.I. 1985); *Rhode Island Liquor Stores Ass'n v. Evening Call Publishing Co.*, 497 A.2d 331, 335 (R.I. 1985).

A threshold issue in this case, therefore, is whether a legislature wishing to keep prices artificially high may impose *de facto* price control without an open vote on the intensely controversial issue by the simple expedient of censoring truthful price information. The question is of considerable importance to the democratic process, since the issue of whether to fix prices for goods and services remains a matter of intense

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price advertising to any communication making "reference to the price of any alcoholic beverage". The breadth of the Rhode Island ban is demonstrated by the conviction of petitioner for using the word "WoW" in a newspaper advertisement. 39 F.3d at 6. Rhode Island authorities found that the word connoted a favorable price and imposed a $400 fine for its use.

[8] See 39 F.3d at 6. The statute's "asserted" purpose is "the promotion of temperance" and "the reasonable control of the traffic in alcoholic beverages". See R.I. Gen. Laws 3-1-5. Despite doubts, the Rhode Island courts chose to accept the "asserted" purpose at face value. *Rhode Island Liquor Stores Ass'n v. Evening Call Publishing Co.*, 497 A.2d 331, 335 (R.I. 1985).

[9] The difference is potentially important, since a precise articulation of the state's interest is a precondition to the accurate application of *Central Hudson*.

[10] The intervenors argued below that the advertising ban was intended to protect small retailers from price competition by "giants". See 39 F.3d at 8.

political disagreement. *Yee v. Escondido, California*, 503 U.S. 519 (1992); *Citizens Against Rent Control/Coalition for Fair Housing v. Berkley, Cal.*, 454 U.S. 290 (1981). Only if censorship of truthful price information may be used as an end-run around the political process is it necessary to ask whether Rhode Island's censorship scheme violates the commercial speech doctrine.

With respect, *amici* suggest that the First Circuit appears to have overlooked the threshold issue. The First Circuit simply assumed that government may substitute censorship of price information for an open, democratic judgment that price fixing is warranted. But, whatever one's views concerning the predictive value of the Rube Goldberg causal chain underlying Rhode Island's censorship scheme,[11] a critical prior question is whether Rhode Island may seek to use censorship of truthful information about prices to achieve covertly what it lacks the political will to do openly—fix prices of beverages containing alcohol at an artificially high level.

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[11] *Amici* believe that the court below seriously misapplied the *Central Hudson* requirement that all efforts to censor truthful commercial speech be shown to "directly and materially advance" a substantial government interest. See *infra*, at 24-29.

I. CENSORSHIP OF TRUTHFUL INFORMATION ABOUT PRICES MAY NOT BE USED AS AN INDIRECT METHOD OF IMPOSING PRICE CONTROL

A. Rhode Island's Use of Censorship to Impose *De Facto* Price Control Bypasses the Democratic Process and Suppresses Information Needed to Form an Important Political Judgment

No economic issue has triggered more intense disagreement than government efforts to impose price control.[12] While the Court's price control cases do not definitively determine the constitutionality of price controls in all settings, they do definitively demonstrate the enduring—indeed, unique—political controversy that has swirled around the issue throughout our history.

Given the intensely controversial nature of price control, *amici* believe that a decision to fix prices must, at a minimum, be made openly after full opportunity for democratic reflection.[13] Unfortunately, Rhode Island's decision to impose

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[12] Eg. *Munn v. Illinois*, 94 U.S. 113 (1877) (upholding railroad rate regulation); *Houston E. & W. Texas Ry. Co. v. United States* (the Shreveport Rate Case), 234 U.S. 342 (1914) (same); *Williams v. Standard Oil Co.*, 278 U.S. 235 (1929) (invalidating effort to fix gasoline prices); *Tyson & Brother v. Banton*, 273 U.S. 418 (1927) (invalidating effort to fix re-sale price of theater tickets, overruled by *Gold v. DiCarlo*, 380 U.S. 520 (1965) (per curiam); *Ribnik v. McBride*, 277 U.S. 350 (1928) (invalidating ceiling on employment agency fees), overruled by *Olsen v. Nebraska*, 313 U.S. 236 (1941); *Nebbia v. New York*, 291 U.S. 502 (1934) (upholding minimum price for milk); *Sunshine Coal Co. v. Adkins*, 310 U.S. 381 (1940) (upholding minimum price for coal); *West Coast Hotel Co. v Parrish*, 300 U.S. 379 (1937) (upholding minimum wage legislation, overruling *Adkins v. Children's Hospital*, 261 U.S. 525 (1923); *Fisher v. City of Berkeley, Cal.*, 475 U.S. 260 (1986) (upholding rent control against anti-trust challenge); *Yee v. Escondido, California*, 503 U.S. 519 (1992) (declining to address whether mobile home rent control constitutes regulatory taking).

[13] As *amici* have noted, even democratically sanctioned efforts to impose price controls will often raise serious constitutional questions. See *infra* at n.12.

price controls indirectly by censoring truthful information about prices seriously impedes democratic reflection in two ways. First, censorship of truthful information about prices acts as a wide-ranging restriction on the very information that citizens need in order to determine whether price controls are warranted. While the precise application of the prior restraint doctrine to commercial speech remains to be elaborated, *Lowe v. S.E.C.*, 472 U.S. 181 (1985), when, as here, systematic censorship blocks the free circulation of information needed to make an important political judgment, the censorship scheme should be tested by First Amendment norms designed to protect the political process. *Bigelow v. Virginia*, 421 U.S. 809 (1975); *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *Consolidated Edison Co. of New York v. Public Service Comm'n*, 447 U.S. 530 (1980).

Second, regulating prices indirectly through censorship permits legislators to avoid both a clear statement and an open debate on the issue. Instead, the controversial political decision is shrouded in ambiguity and shielded from public scrutiny. If the Rhode Island legislature had used vague and imprecise language to impose price control, doctrines like the "clear statement" rule,[14] the "void-for-vagueness" doctrine,[15] and the prohibition on undue delegation[16] would operate to force the legislature to make the important political decision openly, after full debate and in a manner subject to democratic review. *Youngstown Sheet & Tube Company v. Sawyer*, 343 U.S. 579 (1952) (decision to regulate labor market must be made by legislature, not President, because it requires full political debate). Surely, an effort to use censorship to achieve the same result must be subjected to similar scrutiny. Thus, while price advertising is classically commercial in nature,

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14 *Kent v. Dulles*, 357 U.S. 116 (1957).

15 *Smith v. Goguen*, 415 U.S. 566 (1974).

16 *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

Rhode Island's censorship scheme strikes at a citizen's right to know in its most deeply political sense.

In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) and *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), this Court unequivocally held that censorship of truthful price information may not be used as a back-door means of fixing prices. In *Virginia Pharmacy*, the Court invalidated a Virginia ban on advertising the price of prescription drugs. Virginia argued that its ban was necessary to stabilize prices in order to assure a competent and effective pharmaceutical distribution network. In words that are particularly relevant to this case, Justice Blackmun, writing for the Court, held that censorship of price information not only deprives consumers of important information needed to make rational economic decisions, but also denies the public the information needed to make a political judgment about whether a particular market should be regulated at all. 425 U.S. at 764-65. The *Virginia Pharmacy* Court recognized that suppressing price information in order to control prices bypasses the democratic process and begs the very question of whether price regulation is appropriate.

Similarly, in *Bates v. State of Arizona*, 433 U.S. 350 (1977), the Court invalidated an Arizona ban on advertising the price of routine legal services, noting once again that suppression of truthful information about price deprives the public of important information about the need (or the lack of need) for regulation. 433 U.S. at 364.[17]

In the two decades since *Bates* and *Virginia Pharmacy*, the Court has grappled with a series of complex commercial speech issues, but it has never wavered from its fundamental

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[17] The major issue in *Bates* was whether price advertising of routine legal services was inherently misleading. Once the Court determined that it was not, the Court made short work of the argument that censorship of price advertising was an appropriate way to regulate prices. 433 U.S. at 377.

judgment that price fixing may not be imposed indirectly through censorship. Now, as in *Virginia Pharmacy*, using censorship as a *de facto* road to price control short-circuits the democratic process, corrodes the operation of a market economy, and manipulates consumers as if they were wayward children.[18]

No basis exists to depart from the holding of *Virginia Pharmacy* because the product is alcohol rather than prescription drugs. Courts that have upheld efforts to censor truthful information about the price of alcohol[19] have rested their

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[18] Since *Virginia Pharmacy*, the lower courts have been virtually unanimous in rejecting efforts to use censorship as a back door means of regulating prices. Eg. *Bloom v. O'Brien*, 841 F.Supp. 277 (D. Minn. 1993) (enjoining ban on itemizing gross revenue tax on patient bills); *South Ogden CVS Store, Inc. v. Ambach*, 493 F. Supp. 374 (S.D.N.Y. 1980) (invalidating ban on pharmacist advertising 10% discount for senior citizens); *Louisiana Consumers League, Inc. v. Louisiana State Board of Optometry Examiners*, 557 F.2d 473 (5th Cir. 1977) (invalidating ban on advertising price of prescription eyeglasses); *Wall & Ochs, Inc. v. Hicks*, 469 F. Supp. 873 (E.D.N.Car. 1979) (ban on advertising price of prescription eyeglasses "patently unconstitutional"); *Michigan Beer & Wine Wholesalers Ass'n v. Attorney General of Michigan*, 142 Mich. App. 294, 370 N.W. 2d 328 (1985), *cert. denied*, 479 U.S. 939 (1986) (invalidating ban on advertising retail liquor prices); *Stroh Brewery v. Walp*, Civ. Action No. 1:CV-93-937 (M.D. Pa. 1994) (non-coercive speech about liquor prices protected by First Amendment); *People v. Mobil Oil Corp.*, 48 N.Y.2d 192, 422 N.Y.S. 33, 397 N.E. 2d 794 (1979) (invalidating ban on signs advertising gasoline prices); *Phoenix Mutual life Insurance Co. of New York v. Insurance Department*, 500 F.Supp. 2 (S.D.N.Y. 1980) (ban on truthful advertising of "low cost" insurance violates First Amendment); *Motor Vehicle Mfgs. Assoc. v. Abrams*, 684 F.Supp. 804 (S.D.N.Y. 1988), rev'd in part, 899 F.2d 1315 (2d Cir. 1990), *cert. denied*, 499 U.S. 912 (1991) (invalidating ban on disclosing price impact of compliance with state law) Cf. *Harry & Bryant Co. v. FTC*, 726 F2d 993 (4th Cir.), *cert. denied*, 469 U.S. 820 (1984) (FTC may require itemized price lists for funeral services).

[19] In addition to the court below, several courts have ruled that regulation of alcohol under the 21st Amendment poses a virtually unique setting in which states may ban price advertising. *Queensgate Investing Co. v. Liquor Control Comm'n*, 69 Ohio St. 2d 361, 433 N.E.2d 138, app.

opinions on two shaky props—an argument that the 21st Amendment erodes First Amendment protections in the area of state regulation of alcohol; and an assumption that the "greater" power to ban a product necessarily carries with it a broad "lesser" power to use censorship to discourage the practice. Neither argument can withstand analysis. Indeed, both props were conclusively rejected in *Rubin v. Coors Brewing Co.*, 115 S.Ct. 1585 (1995).

B. The 21st Amendment Does Not Empower Rhode Island to Use Censorship to Fix Prices

Prior to Prohibition, the Supreme Court had held that a state lacked inherent power under its police power to regulate interstate commerce in alcohol. *Leisy v. Hardin*, 135 U.S. 100 (1890). In 1913, Congress sought to grant the necessary power by enacting the Webb-Kenyon Act. See *Clark Distilling Co. v. Western Md. Ry.*, 212 U.S. 311 (1917). Passage of the 18th Amendment made the issue moot. With the repeal of National Prohibition,[20] however, section 2 of the 21st Amendment was enacted to assure that the dormant Commerce Clause would not stand in the way of democratic political judgments to continue Prohibition at the state level.[21] Thus, the 21st Amendment grants the states power to make an

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dismissed, 459 U.S. 807 (1982); *Dunagin v. City of Oxford, Mississippi*, 718 F2d 738 (5th Cir. 1983), cert. denied, 467 U.S. 1259 (1984); *S&S Liquor Mart, Inc. v. Pastore*, 497 A.2d 729 (R.I. 1985); *Pennsylvania State Police v. Hospitality Investments of Philadelphia, Inc.*, 650 A.2d 854 (Pa. 1994). See also, *Oklahoma Telecasters Ass'n v. Crisp*, 699 F.2d 490 (10th Cir. 1983), rev'd on other grounds, *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984).

[20] Ironically, Rhode Island never ratified the 18th Amendment and was among the first states to ratify the 21st.

[21] The 21st Amendment expressly provides:

> The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

intensely controversial political judgment that might, otherwise, be blocked by the Commerce Clause. See *Edwards v. California*, 314 U.S. 160 (1941).

The corollary of such a grant of extraordinary power is that it must be exercised, if at all, only after full political debate and in strict compliance with the Constitution. Not surprisingly, this Court has repeatedly ruled that, far from authorizing an erosion of First Amendment rights, the extraordinary nature of the power granted by the 21st requires scrupulous compliance with the rest of the Constitution. In *Craig v. Boren*, 429 U.S. 190 (1976), for example, the Court explicitly rejected an argument that the 21st Amendment eroded the force of the Equal Protection Clause. In *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984), the Court explicitly rejected an argument that the 21st Amendment altered the norms governing preemption of state efforts to regulate advertising. In *Healy v. The Beer Institute*, 491 U.S. 324 (1989) and *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573 (1986), the Court rejected the argument that the 21st Amendment permitted states to fix prices by requiring an affirmation that in-state prices were no higher than prices in other states. In *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982), the Court rejected an argument that the 21st Amendment eroded the protections of the Establishment Clause. In *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), the Court rejected an argument that the 21st Amendment weakened procedural due process guarantees. See also *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951) (invalidating under Sherman Act statute authorizing private enforcement of minimum prices); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) (invalidating under Sherman Act requirement that wine retailers abide by privately set minimum prices). Most recently, in *Rubin v. Coors Brewing Co.*, 115 S.Ct. 1585 (1995), the Court held that, when states seek to regulate alcohol advertising under the 21st Amendment, they are held "to

the same First Amendment restrictions that apply to the Federal Government." 115 S.Ct. at 1591. Since the 21st Amendment certainly does not enhance the power of the federal government to censor, *Coors* makes it clear that the 21st Amendment does not enhance the power of the states to suppress truthful speech. Justice Thomas' opinion in *Coors* also makes it clear that *California v. LaRue*, 409 U.S. 109 (1972) and its progeny[22] do not support the claim that the 21st Amendment erodes First Amendment rights. *LaRue* upheld the power to ban nude dancing in places where alcohol was served. Since this Court ruled in *Barnes v. Glen Art Theater*, 501 U.S. 560 (1991) that the nude dancing at issue in *LaRue* was not entitled to First Amendment protection, Justice Thomas' observation in *Coors*[23] puts an end to the effort to parlay *LaRue* into a broad authorization to censor truthful commercial speech under the 21st Amendment.

Thus, the 21st Amendment provides no support for the proposition that price controls over alcohol may be introduced covertly via censorship. If anything, the extraordinary nature of the power granted by the 21st Amendment argues that it be exercised openly and only after full political debate.

C. The "Greater" Power to Ban Alcohol Does Not Carry With It a So-Called "Lesser Power" to Ban Truthful Speech About Prices

Nor does the second prop fare any better. Some courts have suggested that the controversial nature of a product carries

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22 *New York State Liquor Authority v. Bellanca*, 452 U.S. 714 (1981); *City of Newport, Ky. v. Iacobucci*, 479 U.S. 92 (1986).

23 Justice Thomas observed:

> Nor does *LaRue* support the Government's position. *LaRue* did not involve commercial speech about alcohol, but instead concerned the regulation of nude dancing in places where alcohol was served. 409 U.S. at 414. 115 S.Ct. at 1590 n.2.

with it a broad power to censor information about it.[24] However, the notion, expressed in dictum in *Posadas de Puerto Rico Associates v. Tourism Co.*, 478 U.S. 328, 346 (1986), that the "greater" power to ban an activity carries with it a "lesser" power to regulate it free from the usual constitutional constraints has been repeatedly rejected by this Court.[25] Most importantly, the dictum in *Posadas* was unanimously repudiated in *Coors*. 115 S.Ct. 1589-90 n.2. After *Coors*, it is now clear that censorship of truthful commercial speech cannot be justified as an incident of a power to prohibit the activity in question.

It was argued in dictum in *Posadas* that censoring commercial speech about an activity is a less drastic government response than direct regulation. But such an argument misconstrues a fundamental postulate of a democratic society—the importance of open political decision-making. While banning an activity is an obvious interference with autonomous choice, the interference occurs openly, and only after a full political debate. Regulation of speech in an effort to manipulate behavior is a far more "drastic" event, since it often affects behavior in a covert manner. It can leave citizens with the illusion of freedom, but the reality of government control. In this case, it has left the citizens of Rhode Island with *de facto* price control over beverages containing alcohol without the "formality" of an up-or-down vote on the question and without ready access

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[24] One of Rhode Island's principal arguments in the lower courts was that the power to ban alcohol necessarily carried with it the power to censor price information. See 39 F.3d at 6.

[25] *Cleveland Board of Education v. Loudermill*, 470 U.S. 523 (1985); *F.C.C. v. League of Women Voters*, 468 U.S. 221 (1984). Compare, *Arnett v. Kennedy*, 416 U.S. 134 (1974) (opinion of Justices Rehnquist, Stewart and Chief Justice Burger) with *Id* at 167 (opinion of Justices Powell and Blackmun); *Id* at 185 (opinion of Justice White); *Id* at 211 (opinion of Justices Marshall, Brennan and Douglas). See generally, Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1415 (1989); Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 Harv. Rev. 4 (1988).

to the information about price levels needed to determine whether price control should be continued.

II. RHODE ISLAND'S EFFORT TO DENY CONSUMERS ACCURATE INFORMATION ABOUT A PRODUCT THEY ARE ABOUT TO BUY VIOLATES THE COMMERCIAL SPEECH DOCTRINE

In Point I, *amici* argue that Rhode Island's censorship scheme is so closely bound up with the fundamental political decision of whether to impose price controls that its constitutionality should be measured by First Amendment standards designed to protect the political process. See *Rubin v. Coors Brewing Co.*, 115 S.Ct. 1585, 1594 (1995) (Stevens, J. concurring); *Bigelow v. Virginia*, 421 U.S. 809 (1975). If, however, the Court elects to analyze Rhode Island's scheme under the commercial speech doctrine, the ban on truthful price advertising fails every prong of the *Central Hudson* test.

The court below erroneously treated the *Central Hudson* test as if it were a radical exception to First Amendment jurisprudence.[26] In fact, the principal difference between First Amendment protection of commercial and non-commercial speech lies in the first prong of *Central Hudson*.[27] The doc-

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[26] For example, the court below took the state's asserted interest in promoting temperance at face value, despite its articulated suspicion that the statute was motivated, at least in part, by a desire to shield small retailers from price competition. 39 F.3d at 8. Similarly, in testing whether the statute directly and materially advanced temperance, the court applied a permissive, rational basis standard more suitable for testing regulation of behavior than censorship of truthful speech. 39 F.3d at 7-8. Finally, the court below simply refused to consider the availability of numerous less drastic alternatives. 39 F.3d at 8. In fairness, the court below did not have the benefit of this Court's unanimous opinion in *Coors Brewing Company* directing that less drastic means be explored.

[27] While accuracy and lawfulness are conditions of commercial speech protection, it is an article of faith in the non-commercial area that there is no such thing as "official" truth. *New York Times v. Sullivan*, 376 U.S. 254 (1964).

trinal differences, if any, are far smaller at the level of the second, third and fourth prongs. In both commercial and non-commercial settings, a would-be censor must persuade a reviewing court that the governmental interest is sufficiently important; that the censorship will actually play a direct and material role in advancing the government's interest; and that adequate alternative means of advancing the state's interest do not exist.

When applied with the requisite rigor demanded by a First Amendment analysis, Rhode Island's scheme fails all three tests.

A. Consumers Have a First Amendment Right to Uncensored Information About the Lawful Products They Are About to Buy.

The key to a generation of commercial free speech cases in this Court is respect for a consumer's right to receive uncensored, accurate information about lawful consumer choices. Despite claims that the free flow of commercial information would cause substantial harm, ranging from the undermining of neighborhood pharmacies[28]; to interference with efforts to maintain integrated neighborhoods;[29] to erosion of the moral fiber of the young,[30] this Court has repeatedly recognized that a consumer-driven, free market economy cannot function in the absence of a free flow of uncensored, truthful commercial information. Just as a functioning political democracy requires the free flow of information needed to make informed political choices, a functioning market economy is dependent on informed choice by autonomous consumers.

Thus, in the 19 years since the Court explicitly recognized in *Virginia Pharmacy* that commercial speech is entitled to

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28 *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

29 *Linmark Associates, Inc. v. Willingboro Tp.*, 431 U.S. 85 (1977).

30 *Carey v. Population Services, Int'l.*, 431 U.S. 678 (1977).

First Amendment protection, it has repeatedly upheld the consumer's right to receive accurate, uncensored commercial information relevant to the making of a lawful economic choice.[31]

In fact, censorship of commercial speech has been upheld by this Court only when the speech would not assist the consumer in making an informed, lawful choice, or where special circumstances require a narrowly tailored, temporary restriction. Thus, where a commercial speaker solicits a consumer to engage in unlawful activity, the speech is not protected by the First Amendment because the consumer's choice is not a lawful one. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973) (gender-typed want ads not protected).[32]

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[31] E.g. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 763-65 (1976) (price information concerning prescription drugs); *Linmark Associates, Inc. v. Willingboro Tp.*, 431 U.S. 85, 96-97 (1977) (information on availability of real estate); *Carey v. Population Services, Int'l.*, 431 U.S. 678, 701 (1977) (information about birth control devices); *Bates v. State Bar of Arizona*, 433 U.S. 350, 374-75 (1977) (information on price and availability of routine legal services); *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557, 567-68 (1980) (information on availability of electrical services); *In re R.M.J.*, 455 U.S. 191 (1982) (information on availability of legal services); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 69 (1983) (commercial information in the mails about birth control); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 643, 646-47 (1985) (information on availability of legal services); *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988) (same); *Peel v. Attorney Registration and Disc. Comm'n*, 496 U.S. 91, 110 & n.18 (1990) (same); *Edenfield v. Fane*, 113 S.Ct. 1792 (1993) (face-to-face information about accountant's services); *Ibanez v. Florida Board of Accountancy*, 114 S.Ct. 2084 (1994) (accurate information concerning lawyers' qualifications); *Rubin v. Coors Brewing Co.*, 115 S.Ct. 1585 (1995) (accurate information concerning alcohol content).

[32] *United States v. Edge Broadcasting Co.*, 113 S.Ct. 2696 (1993), is a complex application of the *Pittsburgh Press* principle. In *Edge Broadcasting*, the United States keyed the legality of broadcast advertisements for state lotteries to whether the activity was lawful in the state

Similarly, where commercial speech is shown to be false or misleading, the speech may be forbidden because it actually impedes consumers in making the informed and autonomous choice on which a free market depends. *Friedman v. Rogers*, 440 U.S. 1 (1979) (ban on misleading trade names).

Finally, where special circumstances are shown to require it, commercial speech may be regulated by a narrowly tailored rule designed to protect the consumer without interfering with the free flow of information. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978) (face-to-face solicitation of accident victims); *Board of Trustees of the State University v. Fox*, 492 U.S. 469 (1989) (solicitation of students by strangers in college dormitory); *Florida Bar v. Went For It, Inc.*, 1995 WL 365648 (U.S.) (30 day moratorium on targeted mail solicitation of accident victims). But see *Edenfield v. Fane*, 113 S.Ct. 1792 (1993) (face-to-face solicitation of business executives by CPA's protected). Thus, whether one focuses on the many cases upholding commercial free speech claims, or on the handful of settings in which commercial free speech has been regulated, the Court's central concern has been the consumer's right to receive information needed to make an informed and autonomous choice.

B. Rhode Island Has Not Asserted an Interest of Sufficient Magnitude to Override the Consumer's Right to Know

Both the Administrator of the statute[33] and the intervening defendants[34] concede that Rhode Island's price advertising

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from which the speech was transmitted. Thus, *Edge Broadcasting* is inapplicable to truthful speech about concededly lawful economic choices.

[33] At a hearing held in connection with petitioner's use of the word "wow" in an advertisement, the Administrator of the Liquor Control Administration, candidly stated:

> "I know both 44 and Douglas are well aware that there are some tremendous concerns at the time of licensing. Many people said they were a chain, they were going to be able to take over the

(footnote 34 appears on next page)

ban is intended, at least in part, to prevent large chains from subjecting small retailers to price competition. See 39 F.3d at 7-8; *Rhode Island Liquor Stores Ass'n v. Evening Call Publishing Co.*, 497 A.2d 331, 335 (R.I. 1985); *Id* at 342 n.10 (Murray, J., dissenting). Such an effort to use censorship to aid one set of economic competitors against another is not merely an insubstantial interest, it is patently illegitimate. At best, therefore, Rhode Island is in the posture of a "mixed motive" censor, where censorship has been motivated by both a permissible and an impermissible motive. *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274 (1977) (when permissible and impermissible motives present, government censor must prove that it would have acted identically even in absence of improper motive). Accordingly, the First Circuit clearly erred in declining to require Rhode Island to demonstrate that the dominant purpose of the statute is promotion of responsible alcohol use, not protection of small retailers.[35]

Moreover, even if one accepts at face value Rhode Island's claim to be promoting temperance through state-imposed censorship, an interest in consumer ignorance does not even qualify as "legitimate", much less as "substantial". The "temperance" that Rhode Island seeks to promote is a metaphor for

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liquor industry in the state of RI. There was a genuine fear that set in among the liquor establishments."

[34] The intervenors repeatedly asserted as a basis for intervention the fact that the statute was intended to protect them against unfair competition. The First Circuit noted the intervenor's explanation of the statute's purpose, but chose to ignore it. 39 F.3d at 8.

[35] For examples of searching inquiry into legislative motive in First Amendment cases, see, eg. *Church of the Lukumi Babalu Aye v. City of Hialeah*, 113 S.Ct. 2217 (searching inquiry into motive necessary in First Amendment free exercise setting); *Wallace v. Jaffrey*, 472 U.S. 38 (1985) (searching inquiry into motive necessary in First Amendment establishment of religion setting); *R.A.V. v. City of St. Paul*, 112 S.Ct. 2538 (1992) (searching inquiry into motive necessary even when dealing with unprotected speech).

the responsible use of alcohol. As such, it clearly qualifies as a "substantial" government interest. But Rhode Island's claim that state-mandated ignorance is the way to achieve responsible alcohol use runs headlong into the First Amendment.[36] The First Amendment flatly rejects the statute's jaundiced view of the capacity of American consumers to act responsibly on the basis of truthful information. The very existence of freedom of speech is premised on an assumption that individuals are capable of dealing with the truth. If American consumers cannot be trusted to know the price of a bottle of scotch, how can the same individuals be trusted to make the political judgments necessary to govern a free nation?

Not surprisingly, since *Virginia Pharmacy*, this Court has never upheld a total ban on the dissemination of truthful information about a lawful product in an effort to manipulate consumer behavior. Neither *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328 (1986), nor *Florida Bar v. Went For It, Inc.*, 1995 WL 365648 (U.S.) are to the contrary.

In *Posadas*, this Court upheld a narrow regulation banning advertising of casino gambling "aimed" at natives of Puerto Rico. The original version of the regulation in *Posadas* had flatly banned all advertisement in the Spanish language capable of reaching the attention of residents of Puerto Rico. *Id* at 332-33. As such, it was analogous to the total information ban imposed by Rhode Island in this case. The Superior Court of Puerto Rico struck down the total information ban as violative of the First Amendment. *Id* at 335-36. In its place, the Court substituted an amended regulation that permitted widespread dissemination of truthful information to residents about casino gambling in the Spanish language press, as well as the distribution of promotional material in Spanish, but banned

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[36] A semantic difficulty is concealed in the articulation of Rhode Island's "interest". While Rhode Island asserts a long-range "interest" in temperance, its short term "interest" is consumer ignorance. In testing the sufficiency of the state's interest in censorship under *Central Hudson*, *amici* believe that both long-term and short-term interests must be tested.

promotional advertising "aimed" at natives of Puerto Rico. *Posadas*, therefore, does not support Rhode Island's effort to impose a flat ban on the dissemination of truthful information about prices, since, in *Posadas*, ample alternative means of transmitting the information in question were carefully left open.[37] Moreover, to the extent that dictum in *Posadas* upholds the government's power to use censorship of truthful information to manipulate consumer behavior because consumers cannot be trusted to act responsibly, it is inconsistent with the rationale used by the Court in those few settings where truthful commercial speech has been regulated.

In *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978), for example, a ban on face-to-face solicitation of accident victims by lawyers was upheld, not because consumers could not be trusted with the information, but because the Court feared that the lack of public scrutiny posed an unacceptable risk of misleading speech and overreaching behavior. Once again, in *Board of Trustees of the State University v. Fox*, 492 U.S. 469 (1989), the Court sustained a ban on commercial speech by outsiders in college dormitories, not because the students could not be trusted with the information, but because the presence of outsiders in the dormitory posed a threat to the students' physical safety. Finally, in *Florida Bar v. Went For It, Inc.*, 1995 WL 365648 (U.S.), the Court upheld a 30 day moratorium on targeted mail solicitation of accident victims by lawyers. But the Florida ban was not premised on mistrust of the consumer's ability to deal responsibly with truthful information. Indeed, Justice O'Connor's opinion for the Court carefully disavowed "paternalism" and was expressly premised on the widespread availability of information to the protected consumers.

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[37] *Amici* believe that *Posadas* was wrongly decided even when read properly, since absolutely no basis existed to assume that natives of Puerto Rico were less competent to deal with truthful advertising than their North American visitors.

A common thread runs through *Ohralik*, *Fox*, and *Florida Bar*. In each case a consumer's special circumstances were held to support a narrowly tailored regulation that: (1) did not cut off the flow of commercial information to the affected consumers; (2) did not impede the flow of commercial information to the rest of the population; and (3) was strictly limited in terms of time and physical reach. While *amici* believe that *Posadas* can be read narrowly in a manner that is consistent with *Ohralik*, *Fox* and *Florida Bar*, at bottom it stands as the only case in the modern era in which the Court has even arguably upheld censorship based on mistrust of a consumer's ability to deal with truthful commercial speech. In *Coors*, the Court disavowed the most extreme implications of *Posadas*. It is long past time to repudiate any surviving paternalistic invitation to treat consumers as unable to deal responsibly with truthful commercial speech. In any event, neither *Posadas*, *Ohralik*, *Fox* nor *Florida Bar* support a total ban on the flow of truthful commercial information to an entire population in the hope of manipulating consumer behavior.[38]

C. Rhode Island Has Not Demonstrated That Its Censorship Scheme Will Directly and Materially Reduce the Irresponsible Consumption of Alcohol.

Rhode Island has failed to demonstrate that censorship of price information will, in fact, "directly and materially" reduce the irresponsible consumption of alcohol within the meaning of *Central Hudson*. When, as here, First Amendment protection turns on a contested factual question, this Court has made it clear that the judiciary must conduct an independent review of the factual undepinnings of any censorship scheme. *Turner Broadcasting Co. v. FCC*, 114 S.Ct. 2445 (1994); *Edenfield v. Fane*, 113 S.Ct. 1792 (1993); *Ibanez v.*

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[38] *Amici* believe that the Court erred in *Florida Bar* in treating some Florida residents as too thin-skinned to receive commercial information in the mail that might be of benefit to them.

Florida Board of Accountancy, 114 S.Ct. 2084 (1994). Unfortunately, the court below abdicated its responsibility to conduct a searching review of Rhode Island's claim that banning price advertising materially diminishes the irresponsible consumption of alcohol. Instead, the First Circuit deferred totally to the unsubstantiated hunch of the Rhode Island legislature.[39]

At trial, several experts testified that no correlation existed between price advertising and *per capita* alcohol consumption. See 829 F.Supp. at 544-550. Most tellingly, the *per capita* consumption patterns of states that limited price advertising were shown to be no lower (and sometimes higher) than states that permitted it. 829 F.Supp. at 546. Rhode Island's inability to document a correlation between price advertising and *per capita* alcohol consumption is not a coincidence. It flows from the inherent difficulty of predicting the effect of price advertising on retail prices[40] and from the near impossibility of predicting the effects of small price changes on demand for beverages containing alcohol.[41] Thus, both courts below agreed that, at most, Rhode Island had demonstrated a rational basis for hoping that a ban on price advertising would reduce irresponsible alcohol consumption, but had failed to demonstrate that it would, in fact, do so.

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[39] Deference to legislative fact-finding is particularly inappropriate in this case, since the Rhode Island legislature apparently made absolutely no effort to explore the factual issues before enacting the statute in 1956. See *Sable Comunications, Inc. v. F.C.C.*, 492 U.S. 115 (1989); *Lopez v. United States*, 63 U.S.L.W. 4343 (1995).

[40] For example, in *Bates*, Arizona argued that price advertising would raise the price of legal services. 433 U.S. at 377-78. Rhode Island claims in this case that price advertising will depress retail cost.

[41] Rhode Island's assumption that small price differentials will translate into diminished consumption of alcohol overlooks the fact that the alcohol market is complex and highly differentiated. Thus, changes in price generally result in a shift to other brands or to other types of beverage.

The District Court, recognizing that this Court has consistently required would-be censors to demonstrate that censorship would, in fact, materially alleviate the asserted harm, found that Rhode Island had failed to carry its burden of proof. 829 F. Supp. at 554-55. The First Circuit agreed that Rhode Island was obliged to demonstrate the efficacy of its censorship scheme, but dramatically reduced the weight of the would-be censor's burden. Instead of requiring proof that the censorship scheme would, in fact, reduce irresponsible consumption, the First Circuit asked merely whether it was "reasonable" for Rhode Island to hope that censorship of price information would decrease irresponsible consumption. 39 F.3d at 7-8. In effect, the First Circuit substituted a "rational basis" standard of review more appropriate for testing efforts to regulate behavior for the heightened scrutiny standard associated with review of efforts to censor speech.[42] Compare, *Cincinnati v. Discovery Network, Inc.*, 113 S.Ct. 1505, 1510 n.13 (1993) (rejecting rational basis review of speech regulations) with *F.C.C. v. Beach Communications, Inc.*, 113 S.Ct. 2096 (1993) (applying rational basis scrutiny to regulation of behavior).[43]

Ordinarily, the majority may regulate behavior in the rational hope that regulatory activity may bring about a desired social result. *Wisconsin v. Mitchell*, 113 S.Ct. 1811 (1993). Where, however, speech is the target of a censor because of allegations that its message leads to undesirable behavior, the

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[42] In fact, the First Circuit's analysis shifts the burden of proof to the speaker. The Court below held that unless petitioner could disprove Rhode Island's assertions, they would remain as a reasonable basis for the censorship. In effect, therefore, under the First Circuit's analysis, a censorship scheme must be upheld unless the speaker disproves all of the censor's assertions. See *Ibanez v. Florida Board of Accountancy*, 114 S.Ct. 2084 (1994)

[43] Justice O'Connor's opinion in *Florida Bar, supra*, explicitly eschews rational basis review. WL 365648 (U.S.) at p.3.

government must do more than assert a rational belief that sweeping censorship of truthful information about price will foster responsible use of alcohol. In a commercial speech context, the government must demonstrate that banning truthful information about prices will, in fact, reduce irresponsible alcohol consumption. *Edenfield v. Fane*, 113 S.Ct. 1792 (1993). Both lower courts agree that Rhode Island has failed to carry such a burden.

Prior to the pathbreaking free speech opinions of Justices Holmes and Brandeis,[44] speech could be banned merely because the censor had a rational basis for asserting that it had a "bad tendency" to lead to undesirable behavior. *Gitlow v. New York*, 268 U.S. 652 (1925). The very essence of modern free speech protection is a rejection of the bad tendency/rational basis test in favor of heightened judicial scrutiny of a censor's assertion that speech may be banned because it causes undesirable behavior. In many non-commercial speech contexts, the bad tendency/rational basis test has been supplanted by the "clear and present danger" test. *Brandenburg v. Ohio*, 395 U.S. 444 (1969). In the commercial speech area, the heightened causation requirement is reflected by the obligation of a would-be censor to establish that censorship is necessary to directly and materially alleviate the asserted harm. *Edenfield v. Fane*, 113 S.Ct. 1792 (1993); *Central Hudson Gas & Electric Corp. v. Pub. Svc. Comm'n*, 447 U.S. 557 (1980).

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[44] *Schenck v. United States*, 249 U.S. 47 (1919); *Abrams v. United States*, 250 U.S. 616, 627 (1919) (Holmes and Brandeis dissenting); *United States ex rel Milwaukee Soc. Democrat Publishing Co., v. Burleson*, 255 U.S. 407, 436-38 (1920) (Holmes, J. dissenting); *Gilbert v. Minnesota*, 254 U.S. 325, 337 (1920) (Brandeis, J. dissenting); *Pierce v. United States*, 252 U.S. 239, 272-73 (1920) (Holmes and Brandeis, dissenting); *Schuyler v. United States*, 251 U.S. 466, 482 (1920) (Holmes and Brandeis, JJ. dissenting); *Whitney v. California*, 274 U.S. 357, 372-78 (1927) (Brandeis and Holmes, concurring).

Unfortunately, while the First Circuit claimed to apply First Amendment scrutiny, its analysis resurrects the discredited bad tendency/rational basis test. Rational basis is not, however, the test in a modern First Amendment case. *Discovery Network*, 113 S.Ct. 1510, n. 13. Indeed, adoption of a rational basis/bad tendency standard in commercial free speech cases would drain the term "directly advance" of any meaning. It would virtually eliminate any practical distinction between regulating commercial speech and regulating economic behavior.

Although this Court has not explicitly defined a commercial censor's precise burden of proof, its commercial speech cases apply a heightened test that requires would-be censors to prove that censorship will, in fact, "directly" and "materially" advance the censor's asserted interest. Eg. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976); *Linmark Associates, Inc. v. Willingboro Tp.*, 431 U.S. 85 (1977); *Carey v. Population Services, Int'l.*, 431 U.S. 678 (1977); *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980); *Edenfield v. Fane*, 113 S.Ct. 1792 (1993); *Ibanez v. Florida Board of Accountancy*, 114 S.Ct. 2084 (1994). Most recently, in *Rubin v. Coors Brewing Co.*, 115 S.Ct. 1585 (1995), Justice Thomas observed that "educated guesses" and "anecdotal evidence" could not substitute for proof of the close nexus that must be shown to exist between commercial speech and harm. 115 S.Ct. at 1593.[45]

Justice Kennedy, writing for eight members of the Court in *Edenfield*, ruled that Florida had failed to demonstrate the requisite causal link between the targeted speech and the

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[45] *Florida Bar, supra*, is not to the contrary. In *Florida Bar*, Justice O'Connor noted that both the need for the regulation and its efficacy were supported by extensive unrebutted factual evidence. In this case, both lower courts are in agreement that the factual underpinnings of the Rhode Island statute have been thoroughly eroded. Only by applying a rational basis standard of review was the First Circuit able to save the statute.

feared feared evil. In words particularly applicable to this case, Justice Kennedy noted:

> This burden [proving that censorship will "directly advance" a governmental interest] is not satisfied by mere speculation or conjecture; rather a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real *and that its restriction will in fact alleviate them to a material degree.* [citations omitted]. Without this requirement, a State could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression. 113 S.Ct. at 1800. (emphasis added).

Of course, that is precisely what is taking place in this case. Unless Rhode Island is held to a significant burden of proving that a ban on price advertising actually fosters temperance, Rhode Island will have succeeded in parlaying a legitimate concern with fostering responsible use of alcohol into an illegitimate exercise in economic protectionism. Under the First Amendment, Rhode Island is obliged to prove not merely that its desire to censor is reasonable; it must prove that that its censorship scheme will succeed.

D. The Scope of Rhode Island's Censorship Program Is Far Broader Than Necessary.

In the commercial speech context, a would-be censor must explore less drastic means of advancing the state's interest without resorting to censorship. *Rubin v. Coors Brewing Co.*, 115 S.Ct. 1585 (1995). While the less drastic means requirement in a commercial speech context does not require mechanical invalidation of a regulation merely because other alternatives may exist, *Board of Trustees v. Fox*, 492 U.S. 469 (1989), it does require a careful effort to avoid unnecessary censorship. *Peel v. Att'y Registration & Disc. Comm'n*, 496 U.S. 91 (1990). For example, in *Rubin v. Coors Brewing Co.*,

115 S.Ct. 1585 (1995), Justice Thomas noted that the existence of several alternatives "all of which could advance the Government's asserted interest in a manner less intrusive to [the speaker's] First Amendment rights" provided an independent reason to invalidate the statute. In *Coors*, the most obvious alternative noted by Justice Thomas was direct regulation of alcohol content. Direct regulation is equally available to Rhode Island. If Rhode Island can demonstrate that unduly low prices cause irresponsible consumption of alcohol, Rhode Island may seek to set a state minimum price, just as it has done for cigarettes. R.I. Gen. Laws 6-13-2. While *amici* believe that such an interference with the free market would be unwise, of doubtful constitutionality and unresponsive to the real issues posed by problem drinking, at least it would avoid widespread censorship and would permit the people of Rhode Island to make a decision about the wisdom of price control after an open debate. More constructively, Rhode Island could attack problem drinking head-on by enacting serious programs of education, treatment and law enforcement. For, at bottom, tinkering with the price of alcohol, either directly or covertly via censorship, does nothing about problem drinking. It simply transfers wealth from consumers to favored retailers. When, as here, Rhode Island effects such a wealth transfer through censorship, it violates the First Amendment.

CONCLUSION

For the above stated reasons, the decision of the United States Court of Appeals for the First Circuit should be reversed.

Dated: July 6, 1995
New York, New York

Respectfully submitted,

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Supreme Court, U.S.
FILED
JUL 6 1995
OFFICE OF THE CLERK

No. 94-1140

IN THE

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OCTOBER TERM, 1994

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Petitioners,

v.

STATE OF RHODE ISLAND AND
RHODE ISLAND LIQUOR STORES ASSOCIATION,

Respondents.

On Writ of *Certiorari* to the United States
Court of Appeals for the First Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF AMERICAN ADVERTISING FEDERATION, AMERICAN ASSOCIATION OF ADVERTISING AGENCIES, MAGAZINE PUBLISHERS OF AMERICA, AND DIRECT MARKETING ASSOCIATION IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

The American Advertising Federation, the American Association of Advertising Agencies, the Magazine Publishers of America, Inc., and the Direct Marketing Association, by their undersigned attorneys, hereby move the Court for leave, pursuant to Rule 37 of the Rules of the Supreme Court of the United States, to appear as *amici curiae* in the above-captioned proceeding in support of Petitioners 44 Liquormart, Inc. and Peoples Super Liquor Stores, Inc. This motion and the accompanying conditionally filed brief is made within the time specified by Rule 37.3.

The written consent of Petitioners 44 Liquormart, Inc. and Peoples Super Liquor Stores, Inc., and of Respondent Rhode Island Liquor Stores Association, accompanies this motion and proposed brief. Due to the recent addition of interested

parties as proposed *amici curiae* and the travel plans of counsel of record for Respondent State of Rhode Island, movants have not yet been able to obtain written consent to their participation from the State. The State has consented to the appearance of other *amici* on behalf of Petitioner, and movants have no reason to believe that counsel of record for the State will object to their participation. Movants will continue to seek the written consent of the State and will file the same with the Court when obtained.

Together, the *amici curiae* described below represent thousands of advertising agencies, advertisers, broadcasters, publishers, and others who participate in the advertising industry, as well as individuals interested in preserving freedom of speech. It is from this broad-based, national perspective that the *amici* present their views to the Court. The precedent set by this case could directly affect the constitutional interests of the *amici* both by curtailing the outlets for truthful commercial speech about lawful products and services and by undermining the financial ability of the amici to engage in fully protected, noncommercial speech. *Amici* are:

- The American Advertising Federation ("AAF"), a national trade association that represents virtually all elements of the advertising industry. Among AAF's members are companies that produce and advertise consumer products, advertising agencies, magazine and newspaper publishers, radio and television broadcasters, outdoor advertising organizations, and other media. AAF members also include twenty-one national trade associations; more than 200 local professional advertising associations with 52,000 members; and more than 200 college chapters, with more than 6,000 student members. AAF members use virtually all forms of media to advertise and communicate with consumers throughout the United States.

- The American Association of Advertising Agencies ("AAAA"), the national trade association of the advertising agency industry, which represents more than 750 advertising agencies located throughout the United States. Members of the AAAA create and place approximately 80% of all national advertisements, as well as significant portions of local and regional advertising. Most clients of AAAA members are businesses selling goods or services to the public. AAAA is dedicated to advancing the interests of the advertising industry and has actively represented its members in connection with governmental efforts to restrict speech.

- The Magazine Publishers of America, Inc. ("MPA"), a trade association for the consumer magazine industry. MPA was organized in 1919 and has a membership of approximately 200 publishers. Its members represent almost 800 general interest consumer magazines ranging from journals of literature to special interest publications, to multi-million circulation magazines. MPA members provide broad coverage of domestic and international news and publish periodicals covering literature, religion, law, political affairs, science, agriculture, industry and many other interests, avocations and pastimes of the American people.

- The Direct Marketing Association ("DMA"), a non-profit corporation. DMA is the oldest and largest trade association serving the vast community in direct-to-the-consumer advertising and marketing. Its members are firms engaged in or associated with marketing goods and services through direct response efforts, which include the use of catalogs and other printed materials distributed directly to consumers.

The *amici curiae* have joined together in the filing of this brief to ensure that the right to disseminate, and the public's

right to receive, truthful commercial speech about lawful products and services is provided a full measure of constitutional protection. *Amici* firmly believe that such a rule would be consistent with the original understanding of the First Amendment, which encompassed commercial speech as well as core political speech, and the results of this Court's caselaw. It would also discourage government officials from attempting to manipulate consumer choice through the suppression of speech in an attempt to impose paternalistic governmental judgments of what may be in the best interests of the consumer. Such notions fly in the face of the very purpose of the First Amendment — to nurture and preserve the marketplace of ideas and to allow the individual to make his or her own judgments based upon the entirety of available information.

The proposed brief of *amici curiae* does not duplicate arguments raised by the parties. Rather, it explains the historical and policy reasons for providing truthful commercial speech about lawful products and services with full First Amendment protection. More generally, as commentators have noted, an *amicus* is often in a superior position "to focus the court's attention on the broad implications of various possible rulings." Bruce Ennis, *Effective Amicus Briefs*, 33 Cath. U.L. Rev. 603, 608 (1984), *quoted in* Robert L. Stern, et al., *Supreme Court Practice* 570-71 (1986).

The *amici curiae*'s request for leave to participate will not disrupt the briefing schedule, undermine the orderly presentation of argument, delay in any way the resolution of this action, or inject new or unrelated questions into this litigation. The accompanying proposed brief is conditionally submitted to the Court at this time.

WHEREFORE, the American Advertising Federation, the American Association of Advertising Agencies, the Magazine Publishers of America, Inc., and the Direct Marketing Association respectfully request that this Court grant their

motion for leave to file an *amicus curiae* brief in support of Petitioners 44 Liquormart, Inc. and Peoples Super Liquor Stores, Inc.

Respectfully submitted,

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	1
ARGUMENT	2
I. THE FIRST AMENDMENT PROHIBITS DISCRIMINATION AGAINST TRUTHFUL, NON-MISLEADING COMMERCIAL MESSAGES	2
A. The Court's Jurisprudence Is Largely in Accord With the View That Factual, Non-Misleading Commercial Messages Are Fully Protected by the First Amendment	3
1. *The outcome of virtually all of the Court's decisions since* Virginia Pharmacy *has been consistent with the principle that truthful commercial messages about lawful products are entitled to a full measure of constitutional protection*	5
2. *The* Central Hudson *"balancing test" is susceptible to decisions inadequately protective of commercial messages; it also causes confusion among the lower courts*	8
B. The Original Understanding of the First Amendment, When Read with the Common Law of 1791, Confirms That Truthful Commercial Messages Are Entitled to Full First Amendment Protection	12

TABLE OF CONTENTS—Continued

Page

1. *Advertising was an integral part of the "press" in colonial America* 15

2. *The colonial conception of a "free press" included advertising* 16

3. *The Framers' political philosophy, which equated liberty and property, did not distinguish between commercial and non-commercial messages* 19

4. *The First Amendment did not displace the common law restricting false or misleading speech, which is not protected* 22

II. BY BANNING DISSEMINATION OF FACTUAL INFORMATION MERELY BECAUSE IT IS COMMERCIAL IN CONTEXT, THE RHODE ISLAND STATUTES VIOLATE THE FIRST AMENDMENT 24

A. The Rhode Island Ban on Price Information is a Content-Based Restriction Prohibited by the First Amendment 24

B. Even Under This Court's *Central Hudson* Analysis, the Rhode Island Restrictions Must Fail 26

CONCLUSION 29

TABLE OF AUTHORITIES

Cases	Page
Abrams v. United States, 250 U.S. 616 (1919)	17-18
Ackerley Communications of Massachusetts, Inc. v. City of Somerville, 878 F.2d 513 (1st Cir. 1989)	11
Anheuser-Busch v. Mayor & City Council, 855 F. Supp. 811 (D. Md. 1994)	11
Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987)	25
Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985)	12
Bates v. State Bar of Arizona, 433 U.S. 350 (1977)	5
Bigelow v. Virginia, 421 U.S. 809 (1975)	5
Board of Trustees of State University of New York v. Fox, 492 U.S. 469 (1989)	10-11
Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983)	7, 9
Bose Corp. v. Consumer Union, Inc., 466 U.S. 485 (1984)	27
Carey v. Population Services International, 431 U.S. 678 (1977)	5
Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557 (1980)	1-2, 5, 24
City of Cincinnati v. Discovery Network, Inc., 113 S. Ct. 1505 (1993)	5, 28
City of Ladue v. Gilleo, 114 S. Ct. 2038 (1994)	12
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Edenfield v. Fane, 113 S. Ct. 1792 (1993)	8, 26, 27

TABLE OF AUTHORITIES —Continued

Page

Florida Bar v. Went For It, Inc.,
No. 94-226 (U.S. June 21, 1995) 6-7

Friedman v. Rogers,
440 U.S. 1 (1979) 6, 22

Gertz v. Robert Welch, Inc.,
418 U.S. 323 (1974) 23

Heffron v. International Society for Krishna Consciousness, Inc.,
452 U.S. 640 (1981) 11

Hurley v. Irish-American Gay, Lesbian & Bisexual Group,
No. 94-749 (U.S. June 19, 1995) 27

Ibanez v. Florida Department of Business & Professional Regulation,
114 S. Ct. 2084 (1994) 3

Linmark Associates, Inc. v. Township of Willingboro,
431 U.S. 85 (1977) 8

McIntyre v. Ohio Elections Commission,
115 S. Ct. 1511 (1995) 12

Metromedia, Inc. v. City of San Diego,
453 U.S. 490 (1981) 23

Miami Herald Publishing Co. v. Tornillo,
418 U.S. 241 (1974) 23

Milkovich v. Lorain Journal Co.,
497 U.S. 1 (1990) 23

National Advertising Co. v. Town of Babylon,
900 F.2d 551 (2d Cir.),
cert. denied, 498 U.S. 852 (1990) 11

Ohralik v. Ohio State Bar Association,
436 U.S. 447 (1978) 6, 7, 23

Peel v. Attorney Registration & Disciplinary Commission,
496 U.S. 91 (1990) 5

Penn Advertising of Baltimore, Inc. v. Mayor & City Council,
862 F. Supp. 1402 (1994) 11

TABLE OF AUTHORITIES —Continued

Page

Perpich v. Department of Defense,
496 U.S. 334 (1990) 12

Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations,
413 U.S. 376 (1973) 23

Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico,
478 U.S. 328 (1986) 9

In re R.M.J.,
455 U.S. 191 (1982) 5

Rex v. Higgins,
2 East 5, 102 Eng. Rep. 269 (1801) 23

Rubin v. Coors Brewing Co.,
115 S. Ct. 1585 (1995) 4, 10, 23, 26

Shapero v. Kentucky Bar Association,
486 U.S. 466 (1988) 5,24

Simon & Schuster, Inc. v. Members of New York State Crime Victims Board,
112 S. Ct. 501 (1991) 12, 25

United States v. Edge Broadcasting Co.,
113 S. Ct. 2696 (1993) 5-6

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,
425 U.S. 748 (1976) 2-4, 9, 17, 24

Zauderer v. Office of Disciplinary Counsel of the Supreme Court,
471 U.S. 626 (1985) 6,25

Miscellaneous

1 Annals of Congress (1789),
reprinted in 5 The Founders' Constitution 128-29 (Philip B. Kurland & Ralph Lerner eds., 1987) 20, 22

William Blackstone, 4 *Commentaries on the Laws of England* (1769) 23

TABLE OF AUTHORITIES —Continued

Page

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Letter XVI, Jan. 20, 1788, *in An Additional Number of Letters from the Federal Farmer to the Republican* (1962)..... 14

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TABLE OF AUTHORITIES —Continued

Page

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Frank Presbrey, *The History and Development of Advertising* (1929) 15-16, 18

PUBLICK OCCURRENCES, Both Foreign and Domestick, Sept. 25, 1690, *quoted in* Frank Presbrey, *The History and Development of Advertising* 119 (1929)..... 14

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TABLE OF AUTHORITIES —Continued

Page

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BRIEF *AMICI CURIAE* OF AMERICAN ADVERTISING FEDERATION, AMERICAN ASSOCIATION OF ADVERTISING AGENCIES, MAGAZINE PUBLISHERS OF AMERICA, AND DIRECT MARKETING ASSOCIATION IN SUPPORT OF PETITIONERS

This brief is respectfully submitted, pursuant to Rule 37 of the Rules of the Court, urging reversal of the decision below of the United States Court of Appeals for the First Circuit on the grounds that the statutes at issue herein impermissibly discriminate against truthful, non-misleading commercial speech concerning lawful products. They therefore violate the Petitioners' rights under the First and Fourteenth Amendments to the Constitution of the United States.

INTEREST OF *AMICI CURIAE*

Amici American Advertising Federation, American Association of Advertising Agencies, Magazine Publishers of America, and Direct Marketing Association collectively represent thousands of advertising agencies, advertisers, publishers, and others who participate in the advertising industry, as well as individuals interested in preserving freedom of speech. It is from this broad-based, national perspective that the *amici* present their views to the Court. The precedent set by this case could directly affect the constitutional interests of the *amici* both by curtailing the outlets for truthful commercial speech about lawful products and services and by undermining the financial ability of the amici to engage in fully protected, noncommercial speech.

SUMMARY OF ARGUMENT

Rhode Island's statutory prohibition on truthful, non-misleading alcoholic beverage price advertising cannot be sustained under the standards set forth by this Court in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447

U.S. 557 (1980), and its progeny. The State has failed to show that a "reasonable fit" exists between its goal of combatting alcohol abuse and the means it has employed to achieve that goal. Suppressing truthful commercial speech about lawful products in an attempt to stifle competition and thus drive up the cost to consumers is a misguided — and constitutionally impermissible — way of addressing the problem of alcohol abuse.

Although the Court can decide this case under the *Central Hudson* analysis, *amici* respectfully suggest that the Court use this case to give fresh consideration to the basic premises of its treatment of commercial speech. Specifically, *amici* urge that the Court make clear that truthful commercial messages about lawful products and services are entitled to a full measure of constitutional protection. This approach would be: (1) consistent with the outcome in virtually every Supreme Court case involving such speech since it decided *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); and (2) fully in accord with the original understanding of the First Amendment, as reflected in its text and surrounding historical circumstances.

Moreover, such a determination would eliminate much of the confusion and inconsistency that now characterizes efforts by the lower courts to implement *Central Hudson*'s "balancing" test. In any event, the decision of the First Circuit should be reversed and the laws in question invalidated.

ARGUMENT

I. THE FIRST AMENDMENT PROHIBITS DISCRIMINATION AGAINST TRUTHFUL, NONMISLEADING COMMERCIAL MESSAGES

In *Virginia Pharmacy*, this Court properly recognized that "the free flow of commercial information is indispensable . . . to the proper allocation of resources in a free enterprise system" and to "the formation of intelligent opinions as to

how that system ought to be regulated." *Id.* at 765. Since that time, however, the Court has adopted and applied the *Central Hudson* "balancing" test. That test goes beyond the questions of whether a commercial message is truthful and non-misleading and whether it concerns a lawful product or service. The *Central Hudson* test further seeks to assess whether the asserted governmental interest justifying the regulation is "substantial"; whether the regulation "directly and materially advances" that interest; and whether it does so "in a manner no more extensive than necessary to serve that interest." *Ibanez v. Florida Dep't of Business & Professional Regulation,* 114 S. Ct. 2084, 2088 (1994).

Fortunately, in the decisions of the Court to date, this test has led to **results** that are generally consistent with a grant of full First Amendment protection to truthful advertising of lawful products and services. Accordingly, the approach advocated in this brief would not require substantial modification of previously approved governmental policies. More importantly, however, the proposed analysis would avoid the danger of unlawful censorship that will exist so long as commercial messages are formally subjected to a reduced level of constitutional protection, and thus suppression of speech remains a potential tool for policymakers seeking to influence consumer choice. In addition, the adoption of a categorical approach would eliminate much of the confusion and inconsistency that has marked efforts by the lower courts to implement the *Central Hudson* "balancing" test.

A. The Court's Jurisprudence Is Largely in Accord With the View That Factual, Non-Misleading Commercial Messages Are Fully Protected by the First Amendment.

This Court first made clear that "purely commercial advertising" is entitled to constitutional protection in *Virginia Pharmacy*, 425 U.S. at 755. *Virginia Pharmacy* established that a state ban on advertising the prices of prescription drugs

violated the First Amendment. In that case, the Court rejected the notion that a State could seek to advance its admittedly "strong interest" in maintaining professionalism among pharmacists by silencing the free flow of truthful product information. Instead, the Court endorsed the "alternative to this highly paternalistic approach," and properly "assume[d] that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them." *Id.* at 770. The Court continued: "It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us." *Id.*

Matters have now come full circle. As in *Virginia Pharmacy*, the Court must once again decide whether a sweeping ban on the dissemination of truthful price information regarding a lawful product can survive First Amendment scrutiny. *Amici* urge the Court to reject the paternalistic notion that the State may manipulate the purchasing decisions of consumers by denying them access to truthful product information, commercial or otherwise. Rather, the Court should adhere to its result in the recently decided *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585 (1995), which invalidated a federal statute prohibiting the disclosure of "truthful, verifiable, and nonmisleading factual information about alcohol content on . . . beer labels." *Id.* at 1590. In the process, the Court should state expressly that truthful commercial messages regarding legal products and services may not be banned or regulated merely because of their commercial nature.

1. *The outcome of virtually all of the Court's decisions since* Virginia Pharmacy *has been consistent with the principle that truthful commercial messages about lawful products are entitled to a full measure of constitutional protection.*

Since *Virginia Pharmacy*, this Court's commercial speech decisions have consistently rejected the notion that the government may suppress access to factual, readily verifiable information about legal products and services "for the purpose of manipulating, through ignorance, the consumer choices of some of its citizens." *United States v. Edge Broadcasting Co.*, 113 S. Ct. 2696, 2710 (1993) (Stevens, J., dissenting).[1]

The Court traditionally has upheld restrictions on advertising which (1) concerned products and services that were not unambiguously lawful, or (2) ostensibly prevented

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[1] *See also, e.g., City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505 (1993) (regulation restricting distribution of truthful commercial handbills in order to preserve "safety and esthetics" violates First Amendment); *Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91 (1990) (truthful factual statement that attorney is certified as "specialist" by National Board of Trial Advocacy protected by First Amendment); *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988) (truthful, nondeceptive letters sent to individuals known to face particular legal problems were constitutionally protected); *In re R.M.J.*, 455 U.S. 191 (1982) (rule limiting dissemination of truthful legal advertising violated First Amendment); *Central Hudson Gas & Elec. Corp. v. Public Services Comm'n*, 447 U.S. 557 (1980) (regulation restricting non-deceptive advertisements promoting use of electricity violated First Amendment); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) (truthful attorney advertising constitutionally protected); *Carey v. Population Services Int'l*, 431 U.S. 678 (1977) (law restricting advertising of contraceptives violated First Amendment since it did more than limit misleading or deceptive speech); *Bigelow v. Virginia*, 421 U.S. 809 (1975) (editor could not be prosecuted for running non-deceptive advertisement for a legal service).

consumers from being misled. *Edge* falls into the first category of cases. In that case, the Court upheld federal legislation that banned broadcasts of lottery advertising by radio stations in nonlottery states, but which allowed such advertisements to be broadcast by stations located in states that had state-supported lotteries. The Court found the restrictions on commercial speech justified by "the substantial federal interest in supporting North Carolina's laws making lotteries illegal." *Id.* at 2705.

Friedman v. Rogers, 440 U.S. 1 (1979), is an example of the second exception. There the Court upheld a statute banning the use of trade names by optometric offices on the ground that "there is a significant possibility that trade names will be used to mislead the public." *Id.* at 13. And in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court*, 471 U.S. 626 (1985), the Court approved a requirement that attorneys inform the public that they may be responsible for costs (but not legal fees) if they hire a lawyer on a contingent fee basis: "[W]e hold that an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers." *Id.* at 651 (footnote omitted).[2]

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[2] The ban on in-person solicitation by lawyers upheld in *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978), was similarly found to be constitutional because it prevented attorneys from taking commercial advantage of prospective clients who may be misled or deceived in the proposed transaction. The thirty-day prohibition on targeted direct mail solicitation of accident victims and their relatives upheld in *Florida Bar v. Went For It, Inc.*, No. 94-226 (U.S. June 21, 1995), is also not a significant departure from a rule providing full protection to truthful commercial speech on lawful products. In that case, the Court held that the restriction directly advanced the state's interest in "protecting the privacy and tranquility of personal injury victims and their loved ones against intrusive, unsolicited contact by lawyers" and the collateral impact of such intrusions on the reputation of the legal profession. *Id.*, slip op. at 5-6. As a practical matter, the ability of the state to protect against lawyers' "intru[ding] upon the special

These two exceptions reflect "the 'common-sense' distinction between speech proposing a commercial transaction . . . and other varieties of speech," that the Court noted in *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978). That distinction, embedded in the common law, permits broader regulation of the content of advertising about lawful products and services to ensure its veracity. *See infra* pages 22-24. Such regulations, however, are subject to review by the courts to ensure that the government is not using its police power to define commercial fraud and misrepresentation as a pretext to punish or censor truthful and lawful (protected) communications.[3]

Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983), exemplifies this approach. There, the Court held unconstitutional a statute prohibiting the mailing of unsolicited advertisements for contraceptives. It recognized that "regulation of commercial speech based on content is less problematic . . . . [i]n light of the greater potential for deception or confusion in the context of certain advertising messages." *Id.* at 65. There, however, the asserted governmental interest was not to protect the recipient from deception. Rather, as here, the government sought to address the perceived ill effects flowing from the receipt of truthful information. The Court held that the messages were protected.

(..continued)
vulnerability and private grief of victims or their families," *Id.* at 6 (internal quotations omitted), is not far removed from its recognized ability to protect citizens against fraud or overreaching by members of the legal profession. The majority opinion specifically distinguished the Florida regulation from "situations in which the Government is primarily motivated by paternalism." *Id.* at 13 n.2.

[3] For the purposes of this brief, we assume *arguendo* that the Court correctly upheld restrictions on commercial speech asserted to be false or misleading. *Amici* do not necessarily agree, however, that the commercial communications at issue in each of these cases can fairly be characterized as having been false or misleading.

This Court similarly rejected a state effort to remediate asserted societal problems through the suppression of truthful commercial speech in *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977). In *Linmark*, the Court unanimously overturned a municipal ordinance forbidding the posting of real estate "For Sale" signs, adopted to stem the perceived flight of white homeowners from a racially integrated community. As in *Virginia Pharmacy*, this Court held that "we were unpersuaded that the law was necessary to achieve this objective, and . . . that in any event, the First Amendment disabled the State from achieving its goal by restricting the free flow of truthful information." *Id.* at 95.

Indeed, this Court's decisions have consistently recognized the value of truthful commercial speech. Thus, in *Edenfield v. Fane*, 113 S. Ct. 1792 (1993), the Court struck down a state ban on in-person solicitation by certified public accountants, reaffirming the importance of free communication of truthful, nonmisleading commercial information:

> The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish. Some of the ideas and information are vital, some of slight worth. But the general rule is that the speaker and the audience, not the government, assess the value of the information presented.

Id. at 1798.

The Court should adhere to this "general rule" in the case at bar and allow "the speaker and the audience" to assess the value of price information about alcohol products.

2. *The* Central Hudson *"balancing test" is susceptible to decisions inadequately protective of commercial messages; it also causes confusion among the lower courts.*

The Court's rhetoric, however, has not matched its actions

in providing full First Amendment protection to truthful commercial speech. Instead, in explaining its decisions, the Court has frequently reiterated a broad assertion that "the Constitution accords less protection to commercial speech than to other constitutionally guaranteed forms of expression," *Bolger*, 463 U.S. at 64-65, and then applied the factors set forth in the *Central Hudson* test.

As shown at length below, there is no textual or historical justification for the *Central Hudson* test itself. *See* pp. 12-24 *infra*. This Court was correct in *Virginia Pharmacy* when it extended First Amendment protection to "concededly truthful information about entirely lawful activity." 425 U.S. at 773. The *Central Hudson* test, however, has spurred government actions that are inconsistent with the spirit of *Virginia Pharmacy* itself. This inconsistency is most clearly revealed where, as here, the government asserts "that consumers should be misled or uninformed for their own protection." *Rubin*, 115 S. Ct. at 1597 (Stevens, J., concurring).

Most significantly, *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986), illustrates the perils of utilizing a balancing test to determine the constitutional protection due commercial speech. In *Posadas*, the Court upheld Puerto Rico's restriction on casino gambling advertising directed to residents, which was adopted to circumscribe the perceived ill effects of such gambling on the island's natives. Applying *Central Hudson*, the Court concluded that Puerto Rico's "substantial" interest in "reduc[ing] . . . demand for casino gambling by the residents of Puerto Rico" was "directly advance[d]" by limiting the availability of such advertising to its inhabitants. *Id.* at 341.[4]

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[4] The Court attempted to buttress its opinion in Posadas by making the widely criticized argument that the "greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling" *Id.* at 345-46. *See, e.g.* Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech*, 76 Va. L. Rev.

A major flaw in this analysis is that it can be employed by proponents of regulation in an effort to justify restrictions on a wide variety of commercial messages. To illustrate, numerous products — from foods high in fat, sugar, salt, or nitrates to large-engine cars — have been accused of creating dangers to the public welfare and, arguably, could be banned by Congress or state legislatures. Accordingly, the state's interest in discouraging the use (or abuse) of any of these products could be characterized by supporters of regulation as "substantial."

Furthermore, as in *Posadas*, proponents of regulation can be expected to contend that a ban on advertising related to such products would "directly advance" the state's interest in dissuading consumers from abusing them. But this conclusion flies in the face of twenty-plus years of this Court's caselaw repeatedly invalidating restrictions on truthful advertising, from the price advertising ban in *Virginia Pharmacy* to the ban on alcohol content information in *Rubin*.[5]

(..continued)

627 (1990) (criticizing this rationale). As evidenced by its more recent decisions on commercial speech such as *Rubin*, 115 S. Ct. 1585, this Court has plainly rejected such a broad interpretation of *Posadas*. In *Rubin*, the Court rebuffed the Government's assertion that "legislatures have broader latitude to regulate speech that promotes socially harmful activities, such as alcohol consumption, than they have to regulate other types of speech." *Id* at 1589 n.2. *See also City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 762-63 (1988) ("[T]hat [greater-includes-the-lesser] syllogism is blind to the radically different constitutional harms inherent in the 'greater' and 'lesser' restrictions. . . . [A] law or policy permitting communication in a certain manner for some but not for others raises the specter of content and viewpoint censorship.") (footnote omitted).

[5] See cases discussed *supra* at pp. 5-8. Although *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469 (1989), employs the *Central Hudson* analysis as well, it is best understood — and perhaps should have been analyzed — as a right of access case involving a rule of general applicability affecting many business

A second flaw in the *Posadas* analysis (and the *Central Hudson* test) is that it has caused confusion among the lower courts.[6] Such inconsistencies are an inevitable consequence of asking individual judges to assess the "substantiality" of an asserted state interest and weigh it against the degree of impingement on otherwise protected speech. The dramatic difference in the burden placed upon the State to justify its price advertising ban by the district court and the Court of Appeals in this matter exemplifies the contradictory outcomes that result from application of the *Central Hudson* test.

Balancing tests, by their very nature, tend to promote unprincipled decision-making, confusion, and judicial inconsistency. As such, although "we will have . . . balancing modes of analysis with us forever[,] . . . those modes of analysis should be avoided where possible." Antonin Scalia, *The Rule of Law as A Law of Rules*, 56 U. Chi. L. Rev. 1175, 1187 (1989). Balancing tests such as the *Central Hudson*

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activities in addition to commercial speech. *See Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981) (state fair may require that sale or distribution of any merchandise on state fair grounds be licensed). Unlike the statutes at issue herein, the general ban on most commercial activities on campuses at issue in *SUNY v. Fox* did not directly discriminate against certain forms of speech. Rather, its broad purpose was to keep certain businesses out of university campus dormitories.

[6] *Compare, e.g., National Advertising Co. v. Town of Babylon*, 900 F.2d 551 (2d Cir.), *cert. denied*, 498 U.S. 852 (1990) (ordinances prohibiting maintenance of off-premises signs unconstitutional); *Ackerley Communications of Massachusetts, Inc. v. City of Somerville*, 878 F.2d 513 (1st Cir. 1989) (ordinance prohibiting maintenance of off-premises sign boards unconstitutional) *with Penn Advertising of Baltimore, Inc. v. Mayor & City Council*, 862 F. Supp. 1402 (D. Md. 1994) (ordinance prohibiting outdoor advertising of tobacco products constitutional); *Anheuser-Busch v. Mayor & City Council*, 855 F. Supp. 811 (D. Md. 1994) (ordinance prohibiting off-premises alcohol advertising signs constitutional).

analysis too easily permit judges to "mistake their own predilections for the law." Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cinn. L. Rev. 849, 863 (1989).

Especially when dealing with First Amendment freedoms, "the use of ... traditional legal categories is preferable to the sort of ad hoc balancing that the Court" performs under the *Central Hudson* analysis. *Simon & Schuster, Inc. v. Members of New York State Crime Victims Board*, 112 S. Ct. 501, 514 (1991) (Kennedy, J., concurring); *see also City of Ladue v. Gilleo*, 114 S. Ct. 2038, 2048 (1994) (O'Connor, J., concurring) (in First Amendment area, "fairly precise rules are better than more discretionary and more subjective balancing tests"). The problems inherent in the *Central Hudson* balancing test could largely be avoided if truthful commercial messages concerning lawful products or services were accorded the same constitutional protection (and subject to the same regulation) as other forms of speech.

B. The Original Understanding of the First Amendment, When Read with the Common Law of 1791, Confirms That Truthful Commercial Messages Are Entitled to Full First Amendment Protection.

The conclusion that truthful messages about lawful products or services are entitled to full protection is also consistent with the original meaning of the First Amendment.[7] The Press Clause, when read against the historical

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[7] Whether or not one believes that the text and history of the Constitution determine the outcome of a particular case, the original understanding of the Constitution's terms is without question relevant to any attempt to interpret the Constitution. *See, e.g., McIntyre v. Ohio Elections Comm'n*, 115 S. Ct. 1511, 1525 (1995) (Thomas, J., concurring) ("[w]e should seek the original understanding when we interpret the Speech and Press Clauses"); *Perpich v. Department of Defense*, 496 U.S. 334, 340 (1990); *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 247 (1985) (Brennan, J., dissenting).

background of 1791, confirms that, while government may limit commercial messages concerning lawful products to avoid potentially false or misleading claims, such speech is not subject to a reduced level of constitutional protection in other respects.

"[T]he true meaning [of the freedom of the press] as understood *by the nation* at the time of its ratification" prohibits discrimination against commercial communications merely because they are commercial. Letter of James Madison to John G. Jackson (Dec. 21, 1821) *reprinted in 9 Writings of James Madison* 70, 74 (Galliard Hunt ed., 1819-36) (emphasis in original). Indeed, the development of the concept of a free press and of a commercial, advertising-driven press were inextricably linked. Verner W. Crane, *Benjamin Franklin's Letters to the Press, 1758-1775* xvi (1950) ("It was a commercial age, and it produced a commercial press."). As a result, the modern distinction between "commercial" messages and other forms of speech would simply never have occurred to colonial Americans. At the same time, it is clear that the common law rules limiting misrepresentation survived the adoption of the Bill of Rights. The First Amendment permits the regulation of commercial messages concerning lawful products and services only to ensure that they are truthful and not misleading.

The strongest support for the view that truthful, non-misleading speech about lawful matters is entitled to a full measure of constitutional protection is the text of the Press Clause itself, which does not distinguish between advertisements and other types of messages. Absent specific evidence to the contrary, then, it should be presumed that the original meaning of "the freedom . . . of the press" encompasses all elements of the press, including advertising. Indeed, there is much historical evidence demonstrating that the "press" which the Framers wanted to remain forever free included commercial advertisements.

Certainly, colonial Americans did not distinguish between the types of messages warranting protection from governmental interference. As one contributor writing under the pseudonym "Philalethes" declared in Boston's *Herald of Freedom* in 1788, Americans "are nurtured in the ennobling idea that to think what they please, and to speak, write and publish their sentiments with decency and independency on *every* subject, constitutes the dignified character of Americans." *Boston Herald of Freedom*, Sept. 15, 1788 (emphasis added).[8]

It is clear, moreover, that the "press" which the Framers specifically sought to protect encompassed communication concerning commercial matters. As Richard Henry Lee of Virginia, perhaps the leading Anti-Federalist, said in his demand for a bill of rights, "a free press is the channel of communication to *mercantile* and public affairs. . . ." Letter XVI, Jan. 20, 1788, *in An Additional Number of Letters from the Federal Farmer to the Republican* 151-53 (1962) (emphasis added).[9]

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[8] *Quoted in* Jeffrey A. Smith, *Printers and Press Freedom: The Ideology of Early American Journalism* 19 (1988). When *The New Hampshire Gazette* was launched in 1756, its publisher said that the paper would "contain Extracts from the best Authors on Points of the most useful Knowledge, moral, religious, or political Essays, and such other Speculations as may have a Tendency to improve the Mind, afford any Help to Trade, Manufactures, Husbandry, and other useful Arts, and promote the public Welfare in any Respect." *New Hampshire Gazette*, Oct. 7, 1756, *quoted in* Smith, *supra*, at 49 (emphasis added). True to its word, the Gazette, like the other newspapers of its day, carried everything from price lists to political philosophy.

[9] *Reprinted in Freedom of the Press from Zenger to Jefferson: Early American Libertarian Theories* 144 (Leonard Levy ed., 1966). Among the goals of the first attempted colonial newspaper in 1690 was the promotion of "Business and Negotiations." *PUBLICK OCCURRENCES, Both Foreign and Domestick*, Sept. 25, 1690, quoted in Frank Presbrey, *The History and Development of Advertising* 119 (1929). This newspaper was suppressed by governmental authorities

1. *Advertising was an integral part of the "press" in colonial America.*

The inextricable link between editorial and advertising content in the press of the Eighteenth Century illustrates the fallacy of differentiating for constitutional purposes between commercial and non-commercial speech. For much of that era, newspapers did not generally use layout techniques or differences in typeface to provide a visual distinction between the two; they were regarded as equally of interest to readers and treated the same. Kent R. Middleton, *Commercial Speech in the Eighteenth Century, printed in Newsletters to Newspapers: Eighteenth-Century Journalism* 281 (Donovan H. Bond & W. Reynolds McLeod eds., 1977). The standard colonial newspaper was almost half-filled with local advertising. Lawrence C. Wroth, *The Colonial Printer* 234 (1938). To illustrate, in 1766 Hugh Gaine's *New-York Mercury* was 70% advertising, and 55% of the *Royal Gazette* consisted of commercial matter. Alfred M. Lee, *The Daily Newspaper in America* 32 (1937).

The first daily newspaper in the United States was established in 1784 as a result of pressure for advertising space. When the *Pennsylvania Packet and General Advertiser* initially appeared, ten of its sixteen columns were filled with ads. Frank Presbrey, *The History and Development of Advertising* 161 (1929). As with several other newspapers of the period, the name of this paper (as well as that of New York's first daily, *The New York Daily Advertiser*), reflected the common understanding that commercial advertisements were as much a part of the news of the day (and the purpose of the press) as reports of government activity.[10] The front

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after its first issue.

[10] *See also* Presbrey, *supra*, at 154 ("Advertisements had as much interest as the news columns, perhaps greater interest, for they were more intimately connected with the readers' daily life than were the

pages of the Boston, New York, and Philadelphia newspapers were devoted almost exclusively to advertising. Frank L. Mott, *American Journalism A History: 1690-1960* 157 (1963) ("Most dailies in these years used page one for advertising, sometimes saving only one column of it for reading matter."); *see also* James P. Wood, *The Story of Advertising* 85 (1958).

The majority of the ads which appeared in colonial newspapers would today be considered "commercial speech." Middleton, *supra*, at 277. ("The colonial press regularly carried reputable medical ads, as well as those for books, cloth, empty bottles, corks, and other useful goods and services."). Often newspapers simply carried long lists of general merchandise available for purchase. Mott, *supra*, at 58. Without these ads, the vibrant colonial press so important to the Revolutionary cause would not have existed. During the Eighteenth Century, like today, "[a]dvertising represented the chief profit margin in the newspaper business." *Id.* at 56. The distinction between commercial and non-commercial speech would simply have been alien to the Framers' generation.

2. *The colonial conception of a "free press" included advertising.*

Given the prevalence of advertising in colonial America, it is not surprising that the very idea of a free press evolved in close connection with the development of advertising.[11] In

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foreign items that made up so large a part of the news. Arrival of a new cargo of food or drink, or tools, likely was what the man, home from a reading at the coffee house or tavern, talked about at his fireside rather than the reception of a new envoy at some court in Europe.").

[11] Although the first regularly published American weekly newspaper, the *Boston News-Letter* of May 1-8, 1704, also contained the first paid advertisements, it took about fifteen years for Benjamin Franklin and his brother James to come "into journalism and sow[ ] the seed of a free press and an expansion of advertising." Presbrey, *supra*, at 131; see also Frank L. Mott, *American Journalism A History: 1690-*

fact, one of the best-known statements in defense of a free press was written in response to an attack on an advertisement printed by Benjamin Franklin. In 1731, Franklin printed an advertising notice for a ship's captain. The notice simply "propose[d] a commercial transaction," *Virginia Pharmacy*, 425 U.S. at 760, by seeking additional freight and passengers for the captain's latest voyage. At the bottom of the ad was the note, "No Sea Hens nor Black Gowns will be admitted on any Terms." Benjamin Franklin, *An Apology for Printers*, Pa. Gazette June 10, 1731, *reprinted in* 2 *Writings of Benjamin Franklin*, 172, 176 (1907).

This handbill outraged the local clergy (the "Black Gowns"), although it is unclear whether they were more offended by their exclusion from the pool of desirable passengers or from their placement in the same category as women of ill repute ("Sea Hens"). In response to attacks on the ad, Benjamin Franklin published his "Apology for Printers" which, at that time, was "[b]y far the best known and most sustained colonial argument for an impartial press." Stephen Botein, *Printers and the American Revolution* in *The Press and the American Revolution* 20 (Bernard Bailyn & John B. Hench eds., 1980). Originally published in the June 10, 1731, edition of the *Pennsylvania Gazette*, Franklin's "Apology" contended that "Printers are educated in the Belief that when Men differ in Opinion, both Sides ought equally to have the Advantage of being heard by the Publick."[12] This in-

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1960 11 (1963).

[12] This echoed the sentiment in the libertarian *Cato's Letters*, published from 1720-1724 and widely circulated in the colonies, that "Whilst all Opinions are equally indulged, and all Parties equally allowed to speak their Minds, the Truth will come out." John Trenchard & Thomas Gordon, 3 *Cato's Letters* 295 (1733). These letters were "the most popular, quotable, esteemed source of political ideas in the colonial period." Clinton L. Rossiter, *Seedtime of the Republic* 141 (1953). *Compare Abrams v. United States*, 250 U.S. 616, 630 (1919) ("the best test of truth is the power of the thought to get itself accepted

cident illustrates that, at least to Franklin, the "Opinions" stated even in advertisements should be "heard by the Publick." Thus, America's first sustained defense of a free press, and of the very notion of a "marketplace of ideas," came in response to an attack on a classic example of commercial speech.

One of the major precipitating events of the American Revolution also involved a defense of advertisements. The Stamp Act of 1765 taxed each newspaper — and imposed an additional two-shilling tax on each advertisement. "This was a heavy tax in proportion to the value of the item being taxed," and galvanized the colonial press against the British government. John Lofton, *The Press as Guardian of the First Amendment* 2 (1980). The opposition of newspapers to the Stamp Act of 1765 was in large part, if not primarily, based on their concern that it encroached on the freedom of expression. Arthur M. Schlesinger, *Prelude to Independence: The Newspaper War on Britain 1764-1776* 70-82 (1966). The repeal of the Stamp Act of 1765 one year after it had been enacted "was a powerful victory for an independent press and for advertising." Presbrey, *supra*, at 151.

Advertisements were not necessary to the press simply because the revenue they generated was required for newspapers to exist; they were thought to have independent value in educating and informing the reading public. As the prominent printer-historian Isaiah Thomas, editor of an ardently pro-Revolutionary newspaper, wrote:

> [Advertisements] are well calculated to enlarge and enlighten the public mind, and are worthy of being enumerated among the many methods of awakening and maintaining the popular attention, with which more modern times, beyond all preceding example,

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in the competition of the market") (Holmes, J., dissenting).

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History of Printing in America with a Biography of Printers, and an Account of Newspapers (1810), *quoted in* Daniel Boorstin, *The Americans: The Colonial Experience* 328, 415 (1958).

3. *The Framers' political philosophy, which equated liberty and property, did not distinguish between commercial and noncommercial messages.*

The inextricable link between commercial and other speech reflects the Framers' political philosophy, which generally equated liberty and property rights. As one newspaper commentator put it, "Liberty and Property are not only join'd in common discourse, but are in their own natures so nearly ally'd that we cannot be said to possess the one without the enjoyment of the other." *Boston Gazette*, Feb. 22, 1768, *quoted in* Clinton L. Rossiter, *Seedtime of the Republic* 379 (1953). This philosophy was based on that of John Locke, who defined the "state of perfect freedom" as the ability of people "to order their actions, and dispose of their possessions and persons, as they think fit, within the bounds of nature, without asking leave, or depending upon the will of any other man." John Locke, *Second Treatise on Government* ch. 2, § 4 (1790).

Proceeding from Locke's thesis, Cato wrote:

> By Liberty, I understand the Power which every Man has over his own Actions, and his Right to enjoy the Fruit of his Labour, Art, and Industry, so far as it hurts not the Society, or any Members of it, by taking from any Member, or by hindering him from enjoying what he himself enjoys. . .

John Trenchard & Thomas Gordon 2 *Cato's Letters* 244-45 (1733).

The generation of the Framers firmly believed in the tie

between liberty and property. For example, George Mason's Virginia Declaration of Rights stated that among the natural rights of man was "the Enjoyment of Life and Liberty, *with the Means of acquiring and possessing Property*, and pursuing Happiness and Safety." Va. Declaration of Rights § 1, *reprinted in* Helen H. Miller, *George Mason: Gentleman Revolutionary* 340 (1975) (emphasis added).

Applying this view to the freedom of expression, Cato articulated the importance of free speech and its inextricable link with property rights as follows: "This sacred Privilege is so essential to free Government that the Security of Property, and the Freedom of Speech, always go together." 1 *Cato's Letters* 95-103 (Essay No. 15, Of Freedom of Speech: That the Same is Inseparable From Publick Liberty, Feb. 4, 1720).[13]

Distinguishing between the value of commercial and non-commercial speech, particularly for the purposes of making it easier to censor the former, thus would never have occurred to the Framers, who essentially regarded all rights, including the right to free speech, as a form of property right shielded from government interference. For example, echoing Locke and Cato, James Madison wrote:

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[13] Cato's articulation of the tie between property rights and free speech was enormously influential in colonial America. Smith, *supra*, at 25. In fact, Cato's Essay on Free Speech, first printed in America by Benjamin Franklin in 1722, contained the seed of the First Amendment's press clause. Cato's Essay contended that "Freedom of Speech is the Great Bulwark of Liberty; they prosper and die together." Cato's Letters No. 15, *quoted in* David S. Bogen, *The Origins of Freedom of Speech and Press*, 42 Md. L. Rev. 429, 444 (1983). Madison lifted Cato's phrase for his original draft of the First Amendment, which provided that "The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty shall remain inviolable." 1 *Annals of Congress* 434 (1789), *reprinted in 5 The Founders' Constitution* 128 (Philip B. Kurland & Ralph Lerner eds., 1987).

> In its larger and juster meaning, [property] embraces every thing to which a man may attach a value and have right; and *which leaves to every one else the like advantage.*
>
> In the former sense, a man's land, or merchandize, or money is called his property.
>
> In the latter sense, man has a property in his opinions and the free communication of them . . . .

James Madison, *Property, The National Gazette* (Mar. 27, 1792), *reprinted in* James Madison, 14 *Papers of James Madison* 266 (Robert A. Rutland & Thomas A. Mason eds., 1983) (emphasis in original). Madison explicitly equated liberty and property, stating that "as a man is said to have a right to his property, he may be equally said to have a property in his rights . . . ." *Id.* In Madison's view, the primary role of government was to guarantee these rights to the individual:

> Government is instituted to protect property of every sort; as well that which lies in the various rights of individuals, as that which the term particularly expresses. This being the end of government, that alone is a *just* government, which *impartially* secures to every man, whatever is his *own.*

Id. (emphasis in original).

Given this equation of liberty and free speech as forms of property, eighteenth-century printers who published advertising-laden newspapers believed that they were exercising the natural right to control the property. In fact, much of the opposition to the British Stamp Act of 1765 and the taxes it imposed on the press — including taxes on advertising — was based on their perceived offense to property rights. *See* Middleton, *supra*, at 280-81.

In keeping with this recognition that advertising was an inextricable part of the press whose freedom the Framers sought to guarantee, the text of the First Amendment draws no

distinction between the commercial and noncommercial aspects of the press. The purpose of the Press Clause, as Madison said when the First Amendment was reported out of the House select committee, was to expressly declare "the liberty of the press . . . to be beyond the reach of government." 1 *Annals of Congress* 738 (1789), *reprinted in* 5 *The Founders' Constitution* 129 (Philip B. Kurland & Ralph Lerner eds., 1987). There is simply no evidence that the First Amendment places "beyond the reach of government" just that part of it which contained political or other noncommercial speech.

4. *The First Amendment did not displace the common law restricting false or misleading speech, which is not protected.*

That the "freedom of the press" includes advertisements does not mean, however, that false or misleading commercial speech is, or ever was, entitled to First Amendment protection. *See, e.g., Friedman v. Rogers*, 440 U.S. 1 (1979). The First Amendment was adopted against the background of a venerable common law tradition prohibiting commercial misrepresentation. Justice Story addressed that "old head of equity," the law of misrepresentation, in great detail. *See* Joseph Story, *Equity Jurisprudence* § 191 (1836). He described the basic rule as:

> Where the party intentionally, or by design, misrepresents a material fact, or produces a false impression, in order to mislead another, or to entrap or to cheat him, or to obtain an undue advantage; in every sense there is a positive fraud in the truest sense of the terms; there is an evil act with evil intent . . . And the misrepresentation may be as well by deeds or acts, as by words; by artifices to mislead, as well as by positive assertions.

Story, *supra*, § 192; *see* William F. Walsh, *A History of Anglo-American Law* 328-29 (1932) (tracing development of

action of deceit from mid-fourteenth century).[14]

Thus, the Court has correctly noted that there is a "distinction between commercial and noncommercial speech." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 506 (1981). Properly understood, however, that distinction should simply be as follows: the veracity of commercial speech may be policed, whereas the government's ability to regulate "false" or misleading political speech is far more constrained.[15] This distinction avoids the "dilution" which this Court has said would be "invited" were "a parity of constitutional protection for commercial and noncommercial

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[14] Similarly, the Court has consistently held that advertising promoting an unlawful product or service is unprotected. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973). This comports with the common law, which considered it a criminal offense to "procure, counsel, or command another to commit a crime." William Blackstone, 4 *Commentaries on the Laws of England* 36 (1769) (defining an accessory before the fact); *Rex v. Higgins*, 2 East 5, 102 Eng. Rep. 269 (1801) ("A solicitation or inciting of another, by whatever means it is attempted, is an act done; and that such an act done with a criminal intent is punishable by indictment has been clearly established by . . . several cases.").

[15] As Justice Stevens recently noted, "[i]n the commercial context, government is not only permitted to prohibit misleading speech that would be protected in other contexts, but it often requires affirmative disclosures that the speaker might not make voluntarily." *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585, 1594 (1995) (Stevens, J., concurring) (citations omitted). *Cf. Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974) ("[u]nder the First Amendment there is no such thing as a false idea"); *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 256 (1974) (holding unconstitutional "forced speech" with respect to political speech). *But see Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990) (false and defamatory speech may be punished because libelous). Courts remain obligated, however, to review government regulation of commercial speech to ensure that they genuinely target misleading messages and that the government is not using its power to prevent fraud as a pretext to censor truthful communications about lawful products.

speech alike" required. *Ohralik*, 436 U.S. at 456.

Certainly, the First Amendment was not intended to free advertisers to misrepresent their wares or to displace the common law regulating commercial transactions. Thus, in defining misrepresentation, the legislature is carrying forward a common-law tradition which the First Amendment did not displace. The First Amendment does, however, forbid the government from restricting commercial messages for illegitimate ends under the pretext of promoting a vague and generalized concept of "fairness" in every commercial transaction. *See generally Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988). Nor would it permit an outright ban on all commercial communications on the grounds that they are somehow inherently misleading. *Cf. Virginia Pharmacy*, 425 U.S. at 766-69. Finally, as demonstrated below, it certainly would prohibit laws which discriminate against truthful commercial messages about a particular legal product or service the use of which the Government seeks to suppress.

II. BY BANNING DISSEMINATION OF FACTUAL INFORMATION MERELY BECAUSE IT IS COMMERCIAL IN CONTEXT, THE RHODE ISLAND STATUTES VIOLATE THE FIRST AMENDMENT.

Rhode Island's ban on price advertising is unconstitutional whether it is assessed under the strict scrutiny accorded to restrictions on fully protected speech or under the Court's *Central Hudson* test.

A. The Rhode Island Ban on Price Information is a Content-Based Restriction Prohibited by the First Amendment.

Rhode Island's statutory prohibition on pricing information is not based on the contention that the prohibited "expression itself was flawed in some way, either because it was deceptive or related to unlawful activity." *Central Hudson*,

447 U.S. at 566 n.9. Accordingly, the ordinance at issue should be subject to the same level of scrutiny as are regulations banning non-commercial speech. Employing this standard, the ordinance fails because it rests on a content-based distinction that is not narrowly tailored to directly achieve a compelling state interest. *See, e.g., Simon & Schuster*, 112 S. Ct. at 509.

Rhode Island's statutes, on their face, restrict the distribution of certain forms of information solely because they relate to alcoholic beverages. *See Virginia Pharmacy*, 425 U.S. at 771 (prescription drug price advertising ban "singles out speech of a particular content and seeks to prevent its dissemination completely"). "Such official scrutiny of the content of publications as the basis for [an advertising ban] is entirely incompatible with the First Amendment's guarantee of freedom of the press." *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987). Rhode Island could not show that it has chosen the least restrictive means possible to achieve a compelling state interest.

The harmful implications of empowering the government to make content-based determinations of the kind required by the Rhode Island ordinance are easily demonstrated. It is one thing to "impos[e] on would-be regulators the cost of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful" in the context of commercial claims. *Zauderer*, 471 U.S. at 646. As demonstrated above, there is a common-law tradition supporting the undertaking of this task by the State. It is quite another, however, to permit government officials to prohibit truthful, nonmisleading commercial speech in order to influence individual decision-making about legal products and services. The latter "highly paternalistic approach" is incompatible with the traditions of a free people.

B. Even Under This Court's *Central Hudson* Analysis, the Rhode Island Restrictions Must Fail.

As the district court held, and as the briefs of Petitioners and their supporting *amici* demonstrate, the State has not shown that the statutes at issue satisfy the requirements of the *Central Hudson* test. This Court has repeatedly reaffirmed that "the Government carries the burden of showing that the challenged regulation advances the Government's interest 'in a direct and material way.'" *Rubin*, 115 S. Ct. at 1592 (*quoting Edenfield v. Fane*, 113 S. Ct. at 1798). This burden "is not slight." *Ibanez*, 114 S. Ct. at 2089. To prevail, the State "must demonstrate that the harms it recites are *real* and that its restriction *will in fact alleviate them to a material degree.*" *Edenfield*, 113 S. Ct. at 1795 (emphasis added). As a result, the State must prove both that price advertising causes increased alcohol consumption and that a ban on price advertising substantially reduces such consumption.

After reviewing the evidence presented by both parties, the district court properly held that the State had failed to meet this burden. *44 Liquormart, Inc. v. Racine*, 829 F. Supp. 543 (D.R.I. 1993), *rev'd*, 39 F.3d 5 (1st Cir. 1994), *cert. granted*, 115 S. Ct. 1821 (1995). Fully analyzing all of the evidence presented, including competing expert testimony, that court found that "Rhode Island's off-premises liquor price advertising ban has no significant impact on levels of alcohol consumption in Rhode Island." *Id.* at 549.

In addition, the district court was presented with unrebutted evidence of the price advertising ban's inefficacy. Despite the State's suppression of price advertising for over thirty-four years, Rhode Island remains in the top thirty percent of states in per-capita alcohol consumption. *Id.* at 546. Further, despite steady increases in overall alcohol advertising over the past fifteen years, alcohol consumption has actually decreased. *Id.*

In reversing the district court, the First Circuit failed to hold the State to the appropriate burden of proof. *44 Liquormart, Inc. v. Rhode Island*, 39 F.3d 5 (1st Cir. 1994), *cert. granted*, 115 S. Ct. 1821 (1995). Instead, perceiving "inherent merit" in the State's position, the First Circuit improperly deferred to the legislature's assumption that barring price advertising would diminish alcohol sales, and implicitly presumed that a general reduction in sales would decrease alcohol abuse. *Id.* at 7-8. Finally, despite the record evidence, the Court found that, "in the absence of any affirmative contradiction to rely on," the district court was bound to affirm the State's ban as reasonable. *Id.* at 8.[16]

This misallocation of the burden of proof completely ignores this Court's decision in *Edenfield*, 113 S. Ct. at 1800.[17] To justify its prohibitions on Petitioners' speech, the State must do more than rely on intuitive suppositions

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[16] The First Circuit further mistakenly assumed that "[a]dvertising must be generally productive, or so much money would not be spent on it." *Id.* at 7. This ignores the fact that most businesses selling "mature products" such as beverage alcohol advertise and compete based on price in order to increase market share, not overall consumption. *See 44 Liquormart*, 829 F. Supp. at 549. Advertising increases an individual manufacturer's profit margin by enabling the manufacturer to gain customers from competitors and to retain customers it already has by promoting brand loyalty. M.J. Waterson, *Advertising Brands & Markets* 19 (1988). A shift of just one market share point (that is, of one percent of current alcoholic beverage consumers) can increase sales by about $500 million. *See* Steven L. Borsby, et al., *Brewing: A Story of Economic Impact* 5 (1994).

[17] The First Circuit's undue deference to the assumptions underlying the statute also conflicts with this Court's frequent admonition that, where First Amendment values are at stake, the judiciary "has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Bose Corp. v. Consumer Union, Inc.* 466 U.S. 485, 499 (1984). *See also Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, No. 94-749, slip op. at 7-8 (U.S. June 19, 1995).

regarding consumer behavior and the paternalistic notion that Rhode Island citizens will drink to excess when confronted with the knowledge that a particular retailer is holding a sale on beer. Given the lack of record evidence demonstrating either that alcohol price advertising is directly linked to the overconsumption of alcohol or that the State's price ban has contributed to any reduction in alcohol abuse, the State has failed to carry its burden of proving any "direct and material" advancement of its goals.

By ignoring the requirements set out in *Edenfield*, the First Circuit condones future indirect attacks on constitutionally protected rights. For example, as one expert in this case noted, Washington, D.C.'s high per capita alcohol consumption rate is attributable in part to the amount of lobbying activity that occurs in the nation's capital, an activity that frequently involves alcoholic beverage consumption. Deposition of David J. Pittman at 14:10-16 (Nov. 10, 1992). Upholding the price ban at issue would be akin to upholding a law prohibiting lobbying to reduce alcohol abuse. Neither ban can be said to advance the government's interest in a "direct and material" way or to avoid improper circumscription of constitutionally protected rights.

Barring price advertising on the theory that it will result in higher prices, and thus less abuse, is not a constitutionally permissible way of achieving the legitimate goal of promoting responsible alcohol consumption. It is a palpably indirect way of proceeding where, as noted by the district court, there are many obvious — and far more direct — alternatives to a restriction on commercial speech. *See Discovery Network*, 113 S. Ct. at 1510 n.13.

CONCLUSION

The principle at stake in this case is whether truthful commercial messages about lawful products and services may be treated entirely differently from noncommercial speech

merely on the basis of their commercial content. If such discrimination is permitted, then government officials may in the future assert supposedly "substantial" interests concerning health, safety, and other matters in a way that threatens to deny consumers access to information they want and need. This threat of censorship is too great, and the "benefits" to be gained from such serious restrictions on truthful communications are too attenuated, to justify adopting such a rule.

This Court should therefore strike down the Rhode Island statutes at issue, reverse the decision of the First Circuit, and confirm that truthful, non-misleading commercial messages concerning lawful products and services are entitled to the full protection of the First Amendment.

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July 6, 1995

Supreme Court, U.S.
FILED
JUL 6 1995
CLERK

(10)

No. 94-1140

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

44 LIQUORMART, INC. and
PEOPLES SUPER LIQUOR STORES, INC.,
Petitioners,

v.

STATE OF RHODE ISLAND and
RHODE ISLAND LIQUOR STORES ASSOCIATION,
Respondents.

On a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF AMICI CURIAE THE BEER INSTITUTE, THE DISTILLED SPIRITS COUNCIL OF THE UNITED STATES, INC. AND THE WINE INSTITUTE IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 3

ARGUMENT 7

I. THE FIRST CIRCUIT MISCONSTRUED SECTION 2 OF THE TWENTY-FIRST AMENDMENT BY IGNORING BOTH ITS UNAMBIGUOUS LANGUAGE AND ITS LEGISLATIVE HISTORY 7

A. The Unambiguous Language of Section 2 Bears No Relation to Rhode Island's Price Advertising Ban 7

B. The Legislative History of Section 2 Shows That It Was Not Intended to Affect Any Constitutional Provision Other Than the Commerce Clause 8

1. *Prior to Prohibition, a Tension Developed between the States' Police Powers over Beverage Alcohol Products and the Federal Government's Commerce Clause Power* 8

2. *Section 2 Was Passed Solely to Remove the Restraint of the Commerce Clause from the States' Exercise of Their Police Powers over the Transportation and Importation of Beverage Alcohol Products* 11

II. THIS COURT HAS INTERPRETED SECTION 2 OF THE TWENTY-FIRST AMENDMENT AS RELEVANT ONLY TO CERTAIN COMMERCE CLAUSE CHALLENGES AND THE SEXUAL CONDUCT CASES 13

TABLE OF CONTENTS—Continued

Page

A. Even in the Area of Commerce Clause Challenges, this Court Increasingly Has Reduced the Significance and Scope of Section 2 13

B. This Court Repeatedly Has Held That the Twenty-first Amendment Has No Impact on Constitutional Provisions Other Than the Commerce Clause, and Particularly Not on the Bill of Rights and the Fourteenth Amendment 16

C. The Sexual Conduct Cases Are a Narrow Exception to this Court's Twenty-first Amendment Jurisprudence 20

III. THIS COURT'S DECISIONS IN *COORS* AND *CAPITAL CITIES CABLE* EVIDENCE THE PRINCIPLE THAT COMMERCIAL SPEECH RIGHTS ARE UNAFFECTED BY THE TWENTY-FIRST AMENDMENT 23

CONCLUSION 25

TABLE OF AUTHORITIES

CASES: Page

Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984) 15
Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991) .. 21
Bates v. State Bar of Ariz., 433 U.S. 350 (1977) .. 6
Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573 (1986) 15
California v. LaRue, 409 U.S. 109 (1972) .....*passim*
California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980) 15-16
Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984) .....*passim*
Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557 (1980) 2, 18
City of Newport, Ky. v. Iacobucci, 479 U.S. 92 (1986) 14, 21
Cooper v. McBeath, 11 F.3d 547 (5th Cir.), *cert. denied*, 114 S. Ct. 2675 (1994) 15
Craig v. Boren, 429 U.S. 190 (1976) .....*passim*
Department of Revenue v. James B. Beam Distilling Co., 377 U.S. 341 (1964) 19
Doran v. Salem Inn, Inc., 422 U.S. 922 (1975) 21
Dunagin v. City of Oxford, Miss., 718 F.2d 738 (5th Cir. 1983) (*en banc*), *cert. denied*, 467 U.S. 1259 (1984) 2, 22, 23
Florida Bar v. Went For It, Inc., 1995 WL 365648 (June 21, 1995) 6
Healy v. Beer Institute, 491 U.S. 324 (1989) 15
Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324 (1964) 14-15
Indianapolis Brewing Co. v. Liquor Cont. Comm'n, 305 U.S. 391 (1939) 14
James Clark Distilling Co. v. Western Md. Ry. Co., 242 U.S. 311 (1917) 10
Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982) 5, 16, 17
Leisy v. Hardin, 135 U.S. 100 (1890) 9
Mandel v. Bradley, 432 U.S. 173 (1977) 18
McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) 19

TABLE OF AUTHORITIES—Continued

	Page
Michigan Beer & Wine Wholesalers Ass'n v. Attorney Gen., 370 N.W.2d 328 (Mich. Ct. App. 1985), *cert. denied*, 479 U.S. 939 (1986)	22
Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972)	17
Murdock v. Pennsylvania, 319 U.S. 105 (1943)	18-19
New York State Liquor Auth. v. Bellanca, 452 U.S. 714 (1981)	21
Norfolk & W. Ry. Co. v. American Train Dispatchers Ass'n, 499 U.S. 117 (1991)	7
Norman's on the Waterfront, Inc. v. Wheatley, 444 F.2d 1011 (3d Cir. 1971)	11
North Dakota v. United States, 495 U.S. 423 (1990)	16
Oklahoma Telecasters Ass'n v. Crisp, 699 F.2d 490 (10th Cir. 1983), *rev'd on other grounds sub nom. Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984)	2-3, 18, 23
Pennsylvania State Police, Bur. of Liquor Cont. Enforcement v. Hospitality Invs. of Phila., Inc., 650 A.2d 854 (Pa. 1994), *petition for cert. filed*, 63 U.S.L.W. 3574 (U.S. Jan. 20, 1995) (No. 94-1247)	22-23
Queensgate Inv. Co. v. Liquor Cont. Comm'n, 433 N.E.2d 138 (Ohio), *appeal dismissed*, 459 U.S. 807 (1982)	18
Rhode Island Liquor Stores Ass'n v. Evening Call Pub. Co., 497 A.2d 331 (R.I. 1985)	23
Rhodes v. Iowa, 170 U.S. 412 (1898)	10
Rubin v. Coors Brewing Co., 115 S. Ct. 1585 (1995)	*passim*
S & S Liquor Mart, Inc. v. Pastore, 497 A.2d 729 (R.I. 1985)	23
South Dakota v. Dole, 483 U.S. 203 (1987)	12, 19
State Bd. of Equalization of Calif. v. Young's Market Co., 299 U.S. 59 (1936)	14
324 Liquor Corp. v. Duffy, 479 U.S. 335 (1987)	15
The License Cases, 46 U.S. 504 (1847)	8-9
United Air Lines, Inc. v. McMann, 434 U.S. 192 (1977)	8

TABLE OF AUTHORITIES—Continued

	Page
United States v. Mississippi Tax Comm'n, 412 U.S. 363 (1973)	19
United States v. Mississippi Tax Comm'n, 421 U.S. 599 (1975)	19
Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976)	6
Wilkerson v. Rahrer, 140 U.S. 545 (1891)	9-10
Wisconsin v. Constantineau, 400 U.S. 433 (1971)	5, 16, 17
Wise v. Tennessee Alco. Bev. Comm'n, No. 81-325-I (Tenn. Ct. App. Apr. 13, 1982)	22
Ziffrin, Inc. v. Reeves, 308 U.S. 132 (1939)	14
STATUTES & OTHER AUTHORITIES:	
U.S. Const. amend. XXI	*passim*
27 U.S.C. § 121 (1927 & Supp. 1995)	9
27 U.S.C. § 122 (1927 & Supp. 1995)	10
H.R. Rep. 1461, 62d Cong., 3d Sess. 1 (1913)	10
49 Cong. Rec. 4291-92, 4299, 4447 (1913)	10
76 Cong. Rec. 1622, 4138, 4141, 4143, 4171, 4172 (1933)	11-13
Laurence H. Tribe, *American Constitutional Law* § 6-24 (2d ed. 1988)	21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 94-1140

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44 LIQUORMART, INC. and
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v.

STATE OF RHODE ISLAND and
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Respondents.

On a Writ of Certiorari to the United States Court of Appeals for the First Circuit

---

BRIEF OF AMICI CURIAE THE BEER INSTITUTE, THE DISTILLED SPIRITS COUNCIL OF THE UNITED STATES, INC. AND THE WINE INSTITUTE IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST [1]

Amici are the primary trade associations representing the producers and marketers of beverage alcohol products in the United States. As such, *amici* have a strong in-

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[1] Written consent of all parties to the filing of this brief has been filed with the Clerk of the Court as required by Supreme Court Rule 37.

terest in reversal of the First Circuit's erroneous holding that the Twenty-first Amendment requires a "presumption in favor of the validity" of Rhode Island's ban on Petitioners' truthful, non-misleading price advertising. To the contrary, the Twenty-first Amendment does not create a separate, lower tier of First Amendment protection for those commercial entities that speak about beverage alcohol products. Like all other commercial speech, the advertising of *amici*'s members may not be restricted unless the government satisfies in full measure this Court's test originally set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980) ("*Central Hudson*").

The Beer Institute represents over 250 members of the malt beverage industry. Beer Institute members produce 93 percent of the beer consumed in the United States. The Distilled Spirits Council of the United States, Inc. ("DISCUS") is the primary trade association representing producers and marketers of distilled spirits sold in the United States. DISCUS also represents many major importers of wine. The Wine Institute is an association of California winegrowers. Its members include more than 400 wineries and affiliated businesses, and produce approximately 75 percent of American wine.

If the First Circuit's misapplication of the Twenty-first Amendment is accepted, it would intolerably compromise the First Amendment rights of *amici*, their members and all other producers, marketers, wholesalers, retailers, and consumers of beverage alcohol products. The threat to those rights is real and reaches much farther than the price advertising ban at issue here, as evidenced by two other opinions that erroneously relied on the Twenty-first Amendment to uphold state restrictions on general advertising for beverage alcohol products. *Dunagin v. City of Oxford, Miss.*, 718 F.2d 738, 750-51 (5th Cir. 1983) (*en banc*) (plurality opinion), *cert. denied*, 467 U.S. 1259 (1984) ("*Dunagin*"); *Oklahoma Telecasters Ass'n v. Crisp*, 699 F.2d 490, 498 (10th Cir. 1983), *rev'd on*

other grounds sub nom. Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984) (*"Oklahoma Telecasters"*). *Amici* accordingly urge the Court not only to reverse, but in doing so to make clear that the Twenty-first Amendment has no impact on commercial speech rights protected by the First Amendment.

SUMMARY OF ARGUMENT

The First Circuit erroneously relied on the Twenty-first Amendment to dilute this Court's *Central Hudson* test for reviewing Rhode Island's ban on truthful, non-misleading off-premises price advertising for beverage alcohol products.[2] Addressing *Central Hudson*, the First Circuit initially recognized that a State has the burden of proving that its restriction on commercial speech directly advances the asserted governmental interest. App. 5.[3] But the First Circuit then effectively reversed that burden, by mistakenly relying on a misinterpretation of this Court's holding in *California v. LaRue*, 409 U.S. 109, 118 (1972) (*"LaRue"*), that the Twenty-first Amendment requires an "added presumption" of validity in favor of certain state regulations. App. 5-6, 8. The First Circuit ignored the narrow applicability of the holding in *LaRue* and the careful analysis of the Twenty-first Amendment conducted by the district court, which correctly concluded that the "Amendment does not require a modification of either the level or allocation of the burden of proof in commercial speech cases involving the regulation of the sale of alcoholic beverages." App. 42.

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[2] Although *amici* recognize that current law requires commercial speech restrictions to be reviewed under *Central Hudson*, they respectfully suggest that the Court instead should accord full First Amendment protection to truthful commercial speech such as Petitioners' price advertising. *See Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585, 1594 (1995) (*"Coors"*) (Stevens, J., concurring in the judgment).

[3] The citation form "App. ——" refers to the appendix to the petition herein.

The First Circuit's reliance on the Twenty-first Amendment to reduce free speech rights is contrary to the unambiguous language of that Amendment. Section 1 of the Amendment repealed the Eighteenth Amendment and thereby ended Prohibition. Section 2 of the Twenty-first Amendment, which is the provision at issue here, refers only to the enforcement of laws concerning the "transportation or importation into" a State of beverage alcohol products.[4] No reasonable construction of Section 2's language could embrace Rhode Island's ban on truthful price advertising.

Further, the First Circuit's application of Section 2 flies in the face of the legislative history of the Twenty-first Amendment. Section 2 was passed to remove the restraint imposed by the Commerce Clause on States that sought to remain "dry" by exercising their police powers to prohibit the transportation or importation of beverage alcohol products into their borders. The legislative history of Section 2 contains absolutely no evidence that the framers intended to affect any provision of the Constitution other than the Commerce Clause, let alone the precious freedoms guaranteed by the Bill of Rights and the Fourteenth Amendment.

This Court's decisions adhere to the Twenty-first Amendment's express language and legislative history by generally limiting its impact to the Commerce Clause. Even in that context, the Court has diminished the significance of Section 2 during the past three decades, a shift at odds with the First Circuit's erroneous expansion of Section 2's influence into the free speech area. Most important, the Court repeatedly has held that Section 2 has no impact on various individual constitutional rights.

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[4] Section 2 of the Twenty-first Amendment reads as follows:

> The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

U.S. Const. amend. XXI.

Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982) ("*Larkin*") (Establishment Clause rights); *Craig v. Boren*, 429 U.S. 190 (1976) ("*Craig*") (equal protection rights); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971) ("*Constantineau*") (due process rights).

The First Circuit ignored those cases and erroneously relied on the narrow exception that this Court created in *LaRue*, 409 U.S. at 118, to uphold a ban on " 'performances' that partake more of gross sexuality than of communication" on premises licensed to sell beverage alcohol products. This Court has never applied *LaRue* beyond its unique context. The First Circuit erred by implicitly equating the constitutional value of the gross sexual conduct in *LaRue* with that of Petitioners' truthful, nonmisleading price advertising. Indeed, in *Coors*, 115 S. Ct. 1585, this Court expressly refused to extend the reasoning of *LaRue* to the commercial speech context. *Id.* at 1589-90 n.2.

Coors is one of two decisions by this Court that invalidated restrictions on commercial speech concerning beverage alcohol products. The other is *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984) ("*Capital Cities Cable*") (decided on the basis of federal preemption). Although those decisions do not directly address the precise Twenty-first Amendment question at issue, they evidence the First Circuit's error in interpreting the Twenty-first Amendment as having relieved the States of the restraints placed on them by the First and Fourteenth Amendments. For example, the *Coors* Court held that state regulations on commercial speech concerning beverage alcohol products are "subject, of course, to the same First Amendment restrictions that apply to the Federal Government." 115 S. Ct. at 1591.

The First Circuit seriously underestimated the significance of Petitioners' commercial speech rights. Constitutional protection of commercial speech stems from the recognition of its unique role in the development of consumer

awareness in a free enterprise economy. *Coors*, 115 S. Ct. at 1589. As this Court stated less than three months ago, "a 'particular consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate.'" *Id.* (*quoting Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 763 (1976)). Two seminal commercial speech decisions, *Virginia Pharmacy* and *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), struck down price advertising bans imposed on licensed professions—pharmacists and lawyers—much like the ban imposed by Rhode Island on the beverage alcohol industry.[5] The Twenty-first Amendment simply cannot justify Rhode Island's decision to prohibit Petitioners from communicating the prices of their lawful goods to interested consumers.

The Twenty-first Amendment issue here is not about States' rights. Rather, the issue is whether the constitutional guarantee of free speech should have the same meaning at all levels of government. *Amici* submit that no government—state or federal—has the right to prohibit truthful, non-misleading commercial speech unless it can satisfy in full measure this Court's *Central Hudson* test. The First Circuit erred by relying on the Twenty-

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[5] In *Florida Bar v. Went For It, Inc.*, 1995 WL 365648 (June 21, 1995), this Court reaffirmed its earlier decisions that struck down paternalistic bans on speech. The Court carefully distinguished Florida's restriction, which it upheld, from restrictions that have been "motivated primarily by paternalism." *Id.* at *10 n.2. Rhode Island's ban on truthful price advertising falls squarely within the latter category, as it mirrors the ban in *Virginia Pharmacy*, which the Court struck down because of its "highly paternalistic approach" of keeping consumers in ignorance. 425 U.S. at 770.

The Court in *Florida Bar* also underscored the independent obligation of the courts to "scour" the record when reviewing restrictions on commercial speech. *Id.* at *6. *Amici* submit that any proper, independent "scouring" of the record, like that conducted by the district court, would have concluded that Rhode Island had not met its evidentiary burden.

first Amendment to dilute that test. Its decision should be reversed.

ARGUMENT

I. THE FIRST CIRCUIT MISCONSTRUED SECTION 2 OF THE TWENTY-FIRST AMENDMENT BY IGNORING BOTH ITS UNAMBIGUOUS LANGUAGE AND ITS LEGISLATIVE HISTORY

The First Circuit misinterpreted and misapplied the Twenty-first Amendment by concluding that it was "precisely in order" to use a "presumption" of validity derived from that Amendment in favor of Rhode Island's ban on price advertising. App. 8. As made plain by both the language and the legislative history of the Twenty-first Amendment, its framers had no intention of affecting rights guaranteed by the Bill of Rights and the Fourteenth Amendment. Rather, the only constitutional provision (other than the Eighteenth Amendment) that the framers sought to affect was the Commerce Clause, by removing its restraint on a State's police power over the transportation and importation into its territory of beverage alcohol products.

A. The Unambiguous Language of Section 2 Bears No Relation to Rhode Island's Price Advertising Ban

Any interpretation of Section 2 of the Twenty-first Amendment must begin with its language. *See Norfolk & W. Ry. Co. v. American Train Dispatchers Ass'n*, 499 U.S. 117, 128 (1991). But the First Circuit never quoted a single word from the Twenty-first Amendment. If it referred to the text, the First Circuit should have realized that the plain language of Section 2 has *no* application to Rhode Island's price advertising ban. *See Craig*, 429 U.S. at 206 (favorably quoting a treatise that states that the "text" of the Twenty-first Amendment does not suggest any qualification of individual rights).

The framers of Section 2 expresed their narrow intent in clear terms. Section 2 does not speak of state regula-

tion in general of beverage alcohol products; instead, it mentions only regulation of the "*transportation or importation into* any State, Territory or possession of the United States for delivery or use therein of intoxicating liquors . . . ." U.S. Const. amend. XXI (emphasis supplied). By no stretch of the English language is Rhode Island's ban on truthful price advertising a regulation of the "transportation or importation into" Rhode Island of beverage alcohol products. Further, Section 2 contains no words that even hint at an intention to affect First Amendment rights—an intention of such grave significance that it should not be inferred by the courts.

Because the text of Section 2 unambiguously expresses the framers' limited intent, this Court need not consider Section 2's legislative history in order to reverse the First Circuit. *See United Air Lines, Inc. v. McMann*, 434 U.S. 192, 198-99 (1977). But if considered, that legislative history only reinforces the conclusion that the framers of the Twenty-first Amendment had no intention of affecting the protective sweep of the Bill of Rights and the Fourteenth Amendment.

B. The Legislative History of Section 2 Shows That It Was Not Intended to Affect Any Constitutional Provision Other Than the Commerce Clause

1. *Prior to Prohibition, a Tension Developed Between the States' Police Powers over Beverage Alcohol Products and the Federal Government's Commerce Clause Power*

The genesis of Section 2 of the Twenty-first Amendment must be analyzed in historical context. During our nation's first century, the Commerce Clause was not interpreted as a limitation on the States' police powers over the importation and sale of beverage alcohol products. *See Craig*, 429 U.S. at 205. As Chief Justice Taney wrote in dictum in 1847, ". . . I see nothing in the constitution of the United States to prevent [a State] from regulating and restraining the traffic, or from prohibiting it alto-

gether, if it thinks proper." *The License Cases*, 46 U.S. 504, 577 (1847).

But in 1890, the Court rejected Chief Justice Taney's dictum as too narrowly construing the reach of the Commerce Clause. *Leisy v. Hardin*, 135 U.S. 100, 118 (1890). The Court ruled that the Commerce Clause places the power to regulate interstate commerce in beverage alcohol products exclusively with Congress. *Id.* Because Congress had not regulated such commerce, the Court reasoned that Congress intended it to remain "free and untrammeled." *Id.* at 109-10. Consequently, a State may not exercise its police power over any beverage alcohol product shipped into the State from outside its borders, until that product loses its characteristics as interstate commerce by either removal from its original package or sale. *Id.* at 124-25.

The *Leisy* Court's interpretation of the Commerce Clause made it virtually impossible for "dry" States to prevent the importation and initial sale of any beverage alcohol product in its original package. The Court, however, did suggest a solution to this problem:

> [T]he responsibility is upon congress, so far as the regulation of interstate commerce is concerned, to remove the restriction upon the state in dealing with imported articles of trade within its limits, which have not been mingled with the common mass of property therein, if in its judgment the end to be secured justifies and requires such action.

Id. at 123-24.

Almost immediately after *Leisy*, Congress enacted the Wilson Act, which provided that a State could exercise its police powers over beverage alcohol products as soon as they arrived in that State. 27 U.S.C. § 121 (1927 & Supp. 1995). This Court upheld the Wilson Act in *Wilkerson v. Rahrer*, 140 U.S. 545 (1891), rejecting an argument that Congress had unconstitutionally delegated

its Commerce Clause power to the States. Rather, Congress had "imparted no power to the state not then possessed," but had "simply removed an impediment to the enforcement of the state laws . . . ." *Id.* at 564. The Wilson Act, however, proved ineffective to protect "dry" States because it did not remove the Commerce Clause's impediment on state regulation until after the packages had entered the State. *See Rhodes v. Iowa*, 170 U.S. 412 (1898).

To address the deficiency in the Wilson Act, Congress passed the Webb-Kenyon Act, which was intended "to withdraw the protecting hand of interstate commerce from intoxicating liquors." H.R. Rep. 1461, 62d Cong., 3d Sess. 1 (1913). The language of the Webb-Kenyon Act prefigures Section 2 of the Twenty-first Amendment:

> The shipment or transportation, in any manner or by any means whatsoever, of . . . intoxicating liquor of any kind, from one State, Territory, or District of the United States . . . into any other State, Territory, or District of the United States . . . intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States . . . is hereby prohibited.

27 U.S.C. § 122 (1927 & Supp. 1995). The Webb-Kenyon Act was passed over vigorous constitutional objection and President Taft's veto on constitutional grounds. *See* 49 Cong. Rec. 4291-92, 4299, 4447 (1913).

A divided Court upheld the Webb-Kenyon Act in *James Clark Distilling Co. v. Western Maryland Railway Co.*, 242 U.S. 311 (1917). As it had stated with regard to the Wilson Act, the Court held that the Webb-Kenyon Act did not delegate any powers to the States, "but took the protection of interstate commerce away from all receipt and possession of liquor prohibited by state law." *Id.* at 325; *see id.* at 326. Two years after *James Clark*

Distilling, the Eighteenth Amendment was ratified, and the Prohibition era began, which made moot any question concerning the constitutionality of the Webb-Kenyon Act. The problem with protecting the "dry" States from importation of beverage alcohol products did not arise again until 1933, when Congress began debating the form of the Twenty-first Amendment which would end Prohibition.

2. *Section 2 Was Passed Solely to Remove the Restraint of the Commerce Clause from the States' Exercise of Their Police Powers over the Transportation and Importation of Beverage Alcohol Products*

This Court explained in *Craig* the intent of the framers of Section 2 of the Twenty-first Amendment:

> The wording of § 2 of the Twenty-first Amendment closely follows the Webb-Kenyon and Wilson Acts, expressing the framers' clear intention of constitutionalizing the Commerce Clause framework established under those statutes. This Court's decisions since have confirmed that the Amendment primarily created an exception to the normal operation of the Commerce Clause.

429 U.S. at 205-06 (citations omitted); *see Capital Cities Cable*, 467 U.S. at 712; *Norman's on the Waterfront, Inc. v. Wheatley*, 444 F.2d 1011, 1019 (3d Cir. 1971) ("A primary purpose of section 2 of the twenty-first amendment was to eliminate any problem the states might have in regulating liquor because of the doctrine of *Leisy v. Hardin* . . . .").

The Court's conclusion in *Craig* concerning the framers' intent is well-supported by the legislative history of the Twenty-first Amendment. The Resolution that became the Twenty-first Amendment originated in the Senate. Several Senators made plain that their concern was the sufficiency of the Webb-Kenyon Act to protect "dry" States from importation of beverage alcohol products. Senator Blaine, chairman of the subcommittee that held

hearings on the Resolution and floor manager of the Resolution in the Senate, stated,

> The committee felt that since the Congress had acted and had definitely legislated upon this question [by passing the Webb-Kenyon Act], while that legislation had been sustained by the Supreme Court, yet it was sustained by a divided court, and that we could well afford to guarantee to the so-called dry States the protection designed by section 2.

76 Cong. Rec. 4141 (1933); *see id.* (remarks of Senator Blaine) ("propos[ing] to write permanently into the Constitution a prohibition along that line [of the Webb-Kenyon Act]").

A similarly limited description of Section 2 was offered by Senator Borah, who was known as an "authoritative" advocate of Prohibition. *See id.* at 1622. He described Section 2 as "incorporating [the Webb-Kenyon Act] permanently in the Constitution of the United States." *Id.* at 4172; *see id.* at 4171 (remarks of Senator Wagner) ("[I]f the dry States want additional assurance that they will be protected I shall have no objection."); *id.* (remarks of Senator Robinson) ("I do not wish to ask the Senate to put itself in the position of denying any measure of protection to dry territory.").[6]

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[6] On occasion, members of this Court have suggested that the purpose of Section 2 was to insulate the States from Commerce Clause challenges in areas of beverage alcohol regulation beyond importation and sale. *See, e.g., South Dakota v. Dole*, 483 U.S. 203, 218 (1987) (O'Connor, J., dissenting). This point is not germane here, as Petitioners challenge Rhode Island's price advertising ban under the First Amendment, not the Commerce Clause.

Further, we respectfully suggest that this more expansive view of Section 2 relies on a misinterpretation of Senator Blaine's statement that the "purpose of section 2 is to restore to the States by constitutional amendment absolute control in effect over interstate commerce affecting intoxicating liquors which enter the confines of the States." 76 Cong. Rec. 4143. Senator Blaine made that statement when advocating rejection of a proposed Section 3 to the Amendment, which provided that "Congress shall have con-

Most important for purposes of this case, the legislative history of the Twenty-first Amendment contains absolutely no evidence that the framers intended any impact on individual constitutional rights. As this Court has stated:

> Once passing beyond consideration of the Commerce Clause, the relevance of the Twenty-first Amendment to other constitutional provisions becomes increasingly doubtful. As one commentator has remarked: "Neither the text nor the history of the Twenty-first Amendment suggests that it qualifies individual rights protected by the Bill of Rights and the Fourteenth Amendment where the sale or use of liquor is concerned." P. Brest, *Processes of Constitutional Decisionmaking, Cases and Materials,* 258 (1975).

Craig, 429 U.S. at 206. The First Circuit erred by failing to consider either the language or the legislative history of the Twenty-first Amendment, both of which demonstrate that the framers had no intention to dilute any individual constitutional rights.

II. THIS COURT HAS INTERPRETED SECTION 2 OF THE TWENTY-FIRST AMENDMENT AS RELEVANT ONLY TO CERTAIN COMMERCE CLAUSE CHALLENGES AND THE SEXUAL CONDUCT CASES

A. Even in the Area of Commerce Clause Challenges, this Court Increasingly Has Reduced the Significance and Scope of Section 2

The First Circuit's expansive reading of the Twenty-first Amendment beyond its framers' intent is also at odds

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current power to regulate or prohibit the sale of intoxicating liquors to be drunk on the premises where sold." *Id.* at 4138. When placed in that context, and in light of Senator Blaine's clearly expressed intent that Section 2 would constitutionalize the Webb-Kenyon Act, his "absolute control" language seems logically to mean that the States alone—not concurrently with Congress—should control the importation and sale of beverage alcohol products.

with the Court's post-1964 Twenty-first Amendment jurisprudence. During the past three decades, the Court increasingly has diminished the force of that Amendment in the one area that the framers intended to affect—challenges of state beverage alcohol regulations on Commerce Clause grounds. *See* App. 38 (district court opinion). As Justice Stevens noted in 1986, the Twenty-first Amendment "now has a barely discernible effect in Commerce Clause cases . . . ." *City of Newport, Ky. v. Iacobucci*, 479 U.S. 92, 98 (1986) ("*Iacobucci*") (citations omitted) (dissenting opinion).[7] With the Twenty-first Amendment playing a diminished role even in the Commerce Clause area, the First Circuit erred by expanding it to violate First Amendment rights.

In its earliest decisions interpreting the Twenty-first Amendment, the Court ruled that the Amendment broadly removed the Commerce Clause's restraint on state regulation of transportation and importation of beverage alcohol products. *See, e.g., State Bd. of Equalization of Calif. v. Young's Market Co.*, 299 U.S. 59 (1936) (upholding California license fee imposed on the privilege of importing beer into the State); *Indianapolis Brewing Co. v. Liquor Cont. Comm'n of Mich.*, 305 U.S. 391 (1939) (upholding Michigan's retaliatory statute prohibiting liquor importation from States which discriminated against beer manufactured in Michigan); *Ziffrin, Inc. v. Reeves*, 308 U.S. 132 (1939) (upholding Kentucky's statute forbidding non-licensed common carriers from transporting liquor manufactured in that State).

In 1964, however, the Court issued its watershed decision in *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964), where it made clear that the

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[7] Justice Stevens contrasted the Commerce Clause cases with the sexual conduct cases. *Id.* at 98-99. As discussed in Point II C, *infra*, the latter cases have been confined by the Court to their limited context.

Twenty-first Amendment did not supplant the Commerce Clause entirely in the area of beverage alcohol regulation:

> To draw a conclusion from [the Court's earlier Twenty-first Amendment] decisions that the Twenty-first Amendment has somehow operated to "repeal" the Commerce Clause wherever regulation of intoxicating liquors is concerned would, however, be an absurd oversimplification. If the Commerce Clause had been *pro tanto* "repealed," then Congress would be left with no regulatory power over interstate or foreign commerce in intoxicating liquor. Such a conclusion would be patently bizarre and is demonstrably incorrect.

Id. at 331-32. *See Capital Cities Cable*, 467 U.S. at 712 (same); *Cooper v. McBeath*, 11 F.3d 547, 555 (5th Cir.) (noting the Court's shift away from its early broad reading of the Twenty-first Amendment), *cert. denied*, 114 S. Ct. 2675 (1994).

Since *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, the Court repeatedly has resolved conflicts between state regulation under the Twenty-first Amendment and federal authority under the Commerce Clause in favor of the Commerce Clause. *See Capital Cities Cable*, 467 U.S. 691 (invalidating State's ban on beverage alcohol advertising as applied to federally regulated cable television systems); *Healy v. Beer Institute*, 491 U.S. 324 (1989) (invalidating State's price affirmation statute); *324 Liquor Corp. v. Duffy*, 479 U.S. 335 (1987) (holding that the Twenty-first Amendment does not prevent application of the Sherman Antitrust Act); *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573 (1986) (invalidating State's price affirmation statute); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984) (invalidating State's statutory exemption of locally produced liquor from excise tax on wholesale liquor sales); *Cali-*

fornia Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980) (same as *324 Liquor Corp.*).[8]

This Court's decisions during the past 30 years demonstrate the limited applicability of the Twenty-first Amendment to a State's use of its police powers, even in the one context where it was intended to operate—easing the restraint of the Commerce Clause. Those decisions underscore the First Circuit's error in applying that Amendment to enhance state power and reduce constitutional rights in a context—free speech—where it is wholly irrelevant.

B. This Court Repeatedly Has Held That the Twenty-first Amendment Has No Impact on Constitutional Provisions Other Than the Commerce Clause, and Particularly Not on the Bill of Rights and the Fourteenth Amendment

The First Circuit disregarded three of the Court's decisions that speak most directly to the issue of whether the Twenty-first Amendment affects individual constitutional rights. *See Larkin*, 459 U.S. 116; *Craig*, 429 U.S. 190; *Constantineau*, 400 U.S. 433. Those decisions, which were correctly relied on by the district court (App. 38-39), squarely hold that the Twenty-first Amendment does not weaken rights guaranteed by various provisions of the Bill of Rights and the Fourteenth Amendment. Further, those three decisions are consistent with additional decisions of this Court that have refused to extend the influence of the Twenty-first Amendment.

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[8] Further evidence that the Court has confined the Twenty-first Amendment to the framers' original intent is provided by *North Dakota v. United States*, 495 U.S. 423 (1990). In upholding the application of North Dakota's reporting and labeling regulations to sales of liquor to federal military bases, the Court recognized that the regulations "[fell] within the core of the State's power under the Twenty-first Amendment," because the State sought to prevent diversion of liquor from military bases into the civilian market in that State. *Id.* at 432-33.

Larkin is especially persuasive here because it also involved a challenge based on the First Amendment to a restriction related to beverage alcohol products. 459 U.S. 116. There, the Court invalidated under the Establishment Clause a zoning ordinance that granted a church the power to veto applications for liquor licenses by proprietors whose premises were located within 500 feet of the church. The Court rejected an argument that the zoning ordinance was justified by the Twenty-first Amendment, noting that "[t]he State may not exercise its power under the [Twenty-first] Amendment in a way which impinges upon the Establishment Clause of the First Amendment." *Id.* at 122 n.5. No suggestion was made by the *Larkin* Court that the Twenty-first Amendment required a "presumption in favor of the validity" of the zoning regulation, notwithstanding that the government had brought to the Court's attention the existence of such a presumption in the sexual conduct cases. Brief of the State Appellants at n.30 in *Larkin.*

Similarly, the *Craig* Court ruled that the Twenty-first Amendment has no impact on equal protection rights. There, the Court struck down as invidiously discriminatory a State's statute prohibiting the sale of 3.2 percent beer to males under the age of 21 and females under the age of 18. After distinguishing the sexual conduct cases, the Court held "that the operation of the Twenty-first Amendment does not alter the application of equal protection standards that otherwise govern this case." 429 U.S. at 209; *see Moose Lodge No. 107 v. Irvis,* 407 U.S. 163 (1972) (enjoining enforcement of state liquor licensing law insofar as it required a private club to comply with the club's racially discriminatory constitution and by-laws; applying full equal protection analysis but, unlike *Craig,* not expressly addressing the Twenty-first Amendment issue).

In a third decision involving individual constitutional rights, the Court in *Constantineau* held unconstitutional a State's statute providing for the public posting, without

notice or hearing, of the names of persons who allegedly engaged in habitual excessive drinking. 400 U.S. 433. Again, the Court did not alter its scrutiny of a legislative infringement on individual rights merely because beverage alcohol products were involved.[9]

As discussed below, the Twenty-first Amendment also has had no impact on the Court's review of challenges to beverage alcohol regulations brought under provisions of the Constitution other than the Bill of Rights and the Fourteenth Amendment. Because those decisions involved constitutional provisions no more precious than the First Amendment, they compel the conclusion that the First Amendment also remained unaffected by passage of the Twenty-first Amendment. *See Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943) (suggesting that First

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[9] This Court's summary dismissal in *Queensgate Investment Co. v. Liquor Control Commission*, 433 N.E.2d 138 (Ohio), *appeal dismissed*, 459 U.S. 807 (1982), is not to the contrary. The precedential effect of summary dismissals is limited to "the precise issues presented and necessarily decided by those actions." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977). The Ohio court upheld a much narrower ban than the one at issue here: Ohio expressly *permitted* price advertising for liquor (but not beer) in virtually every advertising medium unless it referred to "price advantage." *Queensgate Inv. Co. v. Liquor Cont. Comm'n*, 433 N.E.2d at 139 n.1. In so ruling, the Ohio court applied the Twenty-first Amendment only in connection with *Central Hudson*'s requirement that the government identify a substantial interest. Unlike the First Circuit, the Ohio court did not interpret the Twenty-first Amendment as altering the evidentiary burdens imposed on the government by the last two parts of the *Central Hudson* test.

The First Circuit did not rely on *Queensgate*, and expressed some confusion about that decision's precedential effect. App. 9. Another appellate court that considered a restriction on beverage alcohol advertising mistakenly interpreted *Queensgate* as standing for the proposition that "the Twenty-first Amendment in some way enhances a state's authority to regulate commercial speech concerning alcoholic beverages." *Oklahoma Telecasters*, 699 F.2d at 497. Accordingly, *amici* respectfully request the Court to clarify that its summary dismissal in *Queensgate* should not be interpreted as expanding state power under the Twenty-first Amendment in the context of the First Amendment's protection of commercial speech.

Amendment freedoms are in a "preferred position" in the constitutional scheme).

For example, in *Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341 (1964), the Court applied the Export-Import Clause to invalidate Kentucky's tax on liquor imports from Scotland into warehouses in that State for distribution in the United States. The Court explained that it "has never so much as intimated that the Twenty-first Amendment has operated to permit what the Export-Import Clause precisely and explicitly forbids." *Id.* at 344. Similarly, the Court rejected an argument that the Twenty-first Amendment created limitations on Congress's constitutional spending power in *South Dakota v. Dole*, 483 U.S. 203. The Court upheld Congress's withholding of federal highway funds to States that did not set a minimum drinking age of 21. *Id.* at 206.

In *United States v. Mississippi Tax Commission*, 412 U.S. 363 (1973), the Court refused to expand the Twenty-first Amendment to insulate a State's attempted taxation of liquor sales to federal military bases. The Court held that the Twenty-first Amendment did not create an exception to Article 1, Section 8, clause 17 of the Constitution, which empowers Congress to "exercise exclusive Legislation" over certain federal enclaves. *Id.* at 378. When that case returned to the Court in *United States v. Mississippi Tax Commission*, 421 U.S. 599, 613-14 (1975), it ruled that the Twenty-first Amendment also did not affect the principle of *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819)—that the Constitution prohibits state taxation of a federal instrumentality. The Court stated that it is "a 'patently *bizarre*' and '*extraordinary* conclusion' to suggest that the Twenty-first Amendment abolished federal immunity as respects taxes on sales to the bases where the United States and Mississippi exercise concurrent jurisdiction . . . ." *United States v. Mississippi Tax Comm'n*, 421 U.S. at 614 (citation omitted; emphasis supplied).

In light of this Court's decisions, the unambiguous language of the Twenty-first Amendment and its legislative history, is it any less "bizarre" and "extraordinary" to conclude, as the First Circuit did, that that Amendment requires a "presumption in favor of the validity" of Rhode Island's restriction on Petitioners' free speech rights?

C. The Sexual Conduct Cases Are a Narrow Exception to this Court's Twenty-first Amendment Jurisprudence

The First Circuit relied on only one decision in purported support of its dilution of Petitioners' commercial speech rights—*LaRue*, 409 U.S. 109. App. 5-6. This Court, however, expressly refused to extend *LaRue* to the commercial speech context in *Coors*. 115 S. Ct. at 1589-90 n.2. In *Coors*, the Court invalidated the federal government's ban on disclosure of alcohol content on labels for malt beverages. The Court rejected the government's argument, based in part on *LaRue*, for "a far more deferential approach to restrictions on commercial speech concerning alcohol:"

> Nor does *LaRue* support the government's position. *LaRue* did not involve commercial speech about alcohol, but instead concerned the regulation of nude dancing in places where alcohol was served.

Id. (citation omitted).

A closer examination of the low-value conduct regulated in *LaRue* reinforces the *Coors* Court's decision. At stake in *LaRue* were " 'performances' that partake more of gross sexuality than of communication." 409 U.S. at 118. Indeed, the Court expressed doubt that most of the conduct that California sought to prevent had a sufficient communicative element to trigger an *O'Brien* analysis. *Id.* at 117-18. Contrary to the First Circuit's apparent view, the "bacchanalian revelries" at issue in *LaRue*, *id.* at 118, are not the constitutional equivalent of Petitioners' truthful price advertising. Commercial speech, which was not recognized as protected by the

First Amendment until after *LaRue*, may not be restricted unless *Central Hudson* is satisfied in full measure.

Unlike the First Circuit, this Court has limited the reasoning of *LaRue* to cases where States prohibit "expressive" acts in the form of simulated sex, nudity or topless dancing—claimed to be protected by the First Amendment—on premises licensed to sell alcohol. In that context—and *only* in that context—the Twenty-first Amendment has been deemed to confer an "added presumption in favor of the validity of the state regulation." *LaRue*, 409 U.S. at 118; *see Iacobucci*, 479 U.S. at 97; *New York State Liquor Auth. v. Bellanca*, 452 U.S. 714, 718 (1981). In his dissenting opinions, Justice Stevens has criticized even that narrow exception to this Court's Twenty-first Amendment jurisprudence as "blatantly incorrect," *Bellanca*, 452 U.S. at 725: "[n]either the plain language nor a fair construction of the purpose of the Twenty-first Amendment lends any support to the Court's holding that the Twenty-first Amendment shields restrictions on speech from full First Amendment review." *Iacobucci*, 479 U.S. at 97.

Regardless of whether the sexual conduct cases should have been decided without reference to the Twenty-first Amendment, the *Coors* Court correctly found those cases irrelevant in the commercial speech context. Those cases are irrelevant because (1) they involved conduct "only marginally" within "the outer perimeters of the First Amendment," *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566 (1991), *and* (2) the regulations challenged in each were an exercise of police power to set the conditions for alcohol sales on licensed premises—nowhere else—and thus only indirectly regulated expressive activity, if any were in fact involved. *See Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932-33 (1975); Laurence H. Tribe, *American Constitutional Law* § 6-24 at 478 n.15 (2d ed. 1988). As the district court noted when distinguishing *LaRue* and *Bellanca*, "[i]n the present action, we are not concerned with conduct or 'public acts' that

violate 'valid penal statutes,' but rather with pure speech that occurs off the licensed premises." App. 40.

Even prior to *Coors*, various courts and judges declined to apply the sexual conduct cases in the commercial speech context. *See Michigan Beer & Wine Wholesalers Ass'n v. Attorney Gen.*, 370 N.W.2d 328, 335 (Mich. Ct. App. 1985) ("[T]he Twenty-first Amendment does not require us to deal with restraints on freedom of speech any differently than we would if alcoholic beverages were not involved."), *cert. denied*, 479 U.S. 939 (1986); *Pennsylvania State Police, Bur. of Liquor Cont. Enforcement v. Hospitality Invs. of Phila., Inc.*, 650 A.2d 854, 857-60 (Pa. 1994) (Castille, J., dissenting), *petition for cert. filed*, 63 U.S.L.W. 3574 (U.S. Jan 20, 1995) (No. 94-1247); *Dunagin*, 718 F.2d at 755 (five dissenting judges incorporating prior panel opinion (701 F.2d 314, 330) that the Twenty-first Amendment does "not change the standard of review" for restrictions on commercial speech); *id.* at 753-54 (two concurring judges rejecting expansion of Twenty-first Amendment as "mischievous and insidious");[10] *see Wise v. Tennessee Alco. Bev. Comm'n*, No. 81-325-I (Tenn. Ct. App. Apr. 13, 1982) (unanimous opinion declaring beverage alcohol advertising ban unconstitutional under Tennessee Constitution; not reaching issue under federal constitution, but expressing skepticism in dicta that the Twenty-first Amendment "has any significant effect" upon commercial speech rights protected by the First Amendment).[11]

For the reasons discussed above, the few opinions that have weakened commercial speech rights in reliance on the sexual conduct cases are in error.[12] More specifically,

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[10] The *Dunagin* court upheld the constitutionality of Mississippi's intrastate ban of beverage alcohol advertising—erroneously in our view—but only the plurality opinion, adopted by a six-judge minority, relied on the Twenty-first Amendment.

[11] The *Wise* decision is reprinted in the Appendix to the Petition in *Hospitality Investments*, No. 94-1247, at 98A-109A.

[12] *See Hospitality Invs.*, 650 A.2d at 856 (holding that *LaRue*, *Bellanca* and *Iacobucci* "clinched" its decision to apply a "reasonable

the First Circuit erred by applying *LaRue* to uphold Rhode Island's ban on Petitioners' truthful, non-misleading price advertising.

III. THIS COURT'S DECISIONS IN *COORS* AND *CAPITAL CITIES CABLE* EVIDENCE THE PRINCIPLE THAT COMMERCIAL SPEECH RIGHTS ARE UNAFFECTED BY THE TWENTY-FIRST AMENDMENT

This Court has given full consideration to only two cases involving restrictions on commercial speech concerning beverage alcohol products. *Coors*, 115 S. Ct. 1585; *Capital Cities Cable*, 467 U.S. 691. On both occasions, those restrictions were invalidated. *Coors* and *Capital Cities Cable* illuminate the First Circuit's misinterpretation of the Twenty-first Amendment.

In *Capital Cities Cable*, this Court recognized that a State's regulation of beverage alcohol advertising is at best weakly related to the Twenty-first Amendment. There, the Court struck down on federal preemption grounds Oklahoma's requirement that cable television operators delete advertisements for certain beverage alcohol products when retransmitting out-of-state signals within Oklahoma. 467 U.S. at 715. The Court held that Oklahoma's interest in restricting some (but not all) of such advertising was "modest," and engaged "only indirectly the central power reserved by § 2 of the Twenty-first Amendment—that of exercising 'control over whether to

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relation" test rather than *Central Hudson* to a state ban on beverage alcohol price advertising); *Rhode Island Liquor Stores Ass'n v. Evening Call Pub. Co.*, 497 A.2d 331, 337 n.7 (R.I. 1985) (upholding same Rhode Island ban as challenged here; stating that the sexual conduct cases required it to "presuppose that the regulation is a legitimate exercise of legislative power"); *S & S Liquor Mart, Inc. v. Pastore*, 497 A.2d 729, 732 (R.I. 1985) (relying on sexual conduct cases to uphold same Rhode Island ban as challenged here); *Dunagin*, 718 F.2d at 750 (plurality opinion relying on the sexual conduct cases to create "presumption in favor of validity" of state ban on beverage alcohol advertising); *Oklahoma Telecasters*, 699 F.2d at 498 (same).

permit importation or sale of liquor and how to structure the liquor distribution system.'" *Id.* (citation omitted). Like Oklahoma's statute, Rhode Island's ban on price advertising is not an exercise of some power purportedly granted by the Twenty-first Amendment; rather, Rhode Island's ban is merely an unjustifiable exercise of its police power that violates the First Amendment.

This same point is made differently in *Coors*, where the Court rejected the federal government's argument that one purpose of its ban on alcohol content disclosure on malt beverage labels was to facilitate similar state regulations:

> Even if the Federal Government possessed the broad authority to facilitate state powers, in this case the Government has offered nothing that suggests that States are in need of federal assistance. States clearly possess ample authority to ban the disclosure of alcohol content—*subject, of course, to the same First Amendment restrictions that apply to the Federal Government.*

115 S. Ct. at 1591 (emphasis supplied).

Coors contradicts the idea, inherent in the First Circuit's ruling, that the Twenty-first Amendment somehow gave the States a greater power to regulate speech than possessed by the federal government, through a presumption of validity in favor of state regulations. *See* App. 5-6, 8. As discussed in Point I, *supra*, the framers of that Amendment expressed no intention to *give* the States any such power, but only to *remove* the restraint imposed by the Commerce Clause. The holding of the *Coors* Court that the federal and state governments are subject to the "same First Amendment restrictions" follows from the framers' intent, underscores the First Circuit's misinterpretation of the Twenty-first Amendment, and requires reversal in this case.

Coors and *Capital Cities Cable* evidence the principle that the Twenty-first Amendment does not weaken the First Amendment when a state regulation of beverage alcohol products touches upon speech. Those decisions are consistent with *Larkin*, *Craig* and *Constantineau*, where this Court held that the Twenty-first Amendment is irrelevant to and does not weaken other guarantees contained in the Bill of Rights and the Fourteenth Amendment. The First Circuit, which issued its decision before *Coors*, erred by relying on the Twenty-first Amendment to abrogate Petitioners' commercial free speech rights.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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No. 94-1140

Supreme Court, U.S.
FILED
JUL 6 1995
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

44 LIQUORMART, INC. and
PEOPLES SUPER LIQUOR STORES, INC.,
Petitioners,

v.

STATE OF RHODE ISLAND and
RHODE ISLAND LIQUOR STORES ASSOCIATION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF AMICI CURIAE NEWSPAPER ASSOCIATION OF AMERICA, A.H. BELO CORPORATION, ADVANCE PUBLICATIONS, INC., THE COPLEY PRESS, INC., COX NEWSPAPERS, INC., DONREY MEDIA GROUP, DOW JONES & COMPANY, INC., THE HEARST CORPORATION, THE NEW YORK TIMES COMPANY, PROVIDENCE JOURNAL COMPANY, THOMSON NEWSPAPER HOLDINGS, INC., and TRIBUNE COMPANY IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

	Page
STATEMENT OF INTEREST	1
SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. THE FIRST AMENDMENT STRONGLY PROTECTS COMMERCIAL SPEECH	5
II. RHODE ISLAND'S ASSERTED "SUBSTANTIAL INTEREST" IS EXTREMELY LIMITED	8
III. RHODE ISLAND'S PRICE ADVERTISING BAN DOES NOT DIRECTLY ADVANCE THE STATE'S ASSERTED INTEREST TO A MATERIAL DEGREE	10
A. The State Must Prove as a Matter of Fact That the Price Advertising Ban Directly Advances a Substantial Governmental Interest	11
B. Rhode Island Has Not Proven That Its Price Advertising Ban Directly Advances the Promotion of "Temperance" in a Material Way	15
IV. THE PRICE ADVERTISING BAN IS MORE EXTENSIVE THAN NECESSARY TO ACHIEVE THE STATE'S ASSERTED INTEREST	20
V. THE TWENTY-FIRST AMENDMENT DOES NOT ALTER THE STATE'S BURDEN OF PROOF UNDER *CENTRAL HUDSON*	23
CONCLUSION	26
APPENDIX	1a

TABLE OF AUTHORITIES

CASES — Page

Bates v. State Bar of Arizona, 433 U.S. 350 (1977) 3, 14
Board of Trustees of State Univ. of N.Y. v. Fox, 492 U.S. 469 (1989) 7
California v. LaRue, 409 U.S. 109 (1972) 23, 25
Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984) 24
Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557 (1980) 4, 6, 10, 20, 22
City of Cincinnati v. Discovery Network, Inc., 113 S. Ct. 1505 (1993) 5, 6, 21
Craig v. Boren, 429 U.S. 190 (1976) 24
Dunagin v. City of Oxford, 718 F.2d 738 (5th Cir.) (en banc), *cert. denied*, 467 U.S. 1259 (1984).... 23
Edenfield v. Fane, 113 S. Ct. 1792 (1993) 4, 7, 10, 11, 13, 19, 21, 22
Florida Bar v. Went For It, Inc., No. 94-226, 1995 WL 365648 (1995) 4, 13, 14
Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, No. 91-749, 1995 WL 360192 (1995) 12
Ibanez v. Florida Dept. of Business and Professional Regulation, 114 S. Ct. 2084 (1994) 7, 11
Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982).. 24
Michigan Beer & Wine Wholesalers Ass'n v. Attorney General, 142 Mich. App. 294, 370 N.W.2d 328 (1985), *cert. denied*, 479 U.S. 939 (1986).... 25
New York State Ass'n of Realtors, Inc. v. Shaffer, 27 F.3d 834 (2d Cir.), *cert. denied*, 115 S. Ct. 511 (1994) 21
Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico, 478 U.S. 328 (1986) 22
Queensgate Investment Co. v. Liquor Control Comm'n, 433 N.E.2d 138 (Ohio), *appeal dismissed*, 459 U.S. 807 (1982) 23
Rhode Island Liquor Stores Ass'n v. Evening Call Publishing Co., 497 A.2d 331 (R.I. 1985) 10, 19
Rubin v. Coors Brewing Co., 115 S. Ct. 1505 (1995) 4, 6, 8, 11, 13, 21, 23, 25

TABLE OF AUTHORITIES—Continued

Page

S & S Liquor Mart, Inc. v. Pastore, 497 A.2d 729 (R.I. 1985) 9, 23
Shapero v. Kentucky Bar Ass'n, 486 U.S. 466 (1988) 7
Turner Broadcasting Sys. v. FCC, 114 S. Ct. 2445 (1994) 12, 13, 14
Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) 2, 4, 5, 14, 20
Wisconsin v. Constantineau, 400 U.S. 433 (1971) .. 24
Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985) 7
44 Liquor Mart, Inc. v. Racine, 829 F. Supp. 543 (D.R.I. 1993), *rev'd*, *44 Liquormart, Inc. v. Rhode Island*, 39 F.3d 5 (1st Cir. 1994), *cert. granted*, 63 U.S.L.W. 3783 (May 2, 1995) 9, 15, 18, 20
44 Liquormart, Inc. v. Rhode Island, 39 F.3d 5 (1st Cir. 1994), *cert. granted*, 63 U.S.L.W. 3783 (May 2, 1995) 8, 11, 17, 20

CONSTITUTIONAL PROVISIONS

U.S. Const., amend. I ..... *passim*
U.S. Const., amend. XXI 5, 10, 23, 24, 25

STATUTES

R.I. Gen. Laws § 3-8-7 8

OTHER AUTHORITIES

LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW (2d ed. 1988) 25

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 94-1140

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44 LIQUORMART, INC. and
PEOPLES SUPER LIQUOR STORES, INC.,
Petitioners,

v.

STATE OF RHODE ISLAND and
RHODE ISLAND LIQUOR STORES ASSOCIATION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF OF AMICI CURIAE NEWSPAPER ASSOCIATION OF AMERICA, A.H. BELO CORPORATION, ADVANCE PUBLICATIONS, INC., THE COPLEY PRESS, INC., COX NEWSPAPERS, INC., DONREY MEDIA GROUP, DOW JONES & COMPANY, INC., THE HEARST CORPORATION, THE NEW YORK TIMES COMPANY, PROVIDENCE JOURNAL COMPANY, THOMSON NEWSPAPER HOLDINGS, INC., and TRIBUNE COMPANY IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST

Amici curiae are a newspaper association and individual newspaper publishers.* America's newspapers are the

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* Written consent of the parties to the filing of this amicus brief has been filed with the Clerk of the Court as required by Supreme Court Rule 37.

conduit through which a significant amount of commercial information is conveyed to the public. Indeed, advertising revenues provide the fundamental financial support for newspapers' ability to gather and report the news, comment on political and other public events, and publish other forms of speech that this Court repeatedly has recognized are vital to a fully-informed public and the proper functioning of our democratic form of government.

Amici have a three-fold interest in the proceedings before this Court. First and foremost, *amici* support full First Amendment protection for the marketplace of ideas in which citizens receive information and make informed decisions. Newspapers are active participants in that marketplace as speakers, as the means by which other speakers may be heard, and as the vehicle for educating citizens to participate effectively in public and private decisionmaking. The press historically has championed and given life to the vision of the Constitution's Framers that decisions affecting the country and the lives of its citizens be made as a result of vigorous and open public debate in which no one's voice is silenced.

Second, *amici* support protection for commercial speech as an important part of the marketplace of ideas, providing an unimpeded flow of truthful, nonmisleading speech about lawful products. Newspapers are a major link between advertisers (speakers) and consumers (recipients), and the First Amendment was intended to foster the interests of both. "Freedom of speech presupposes a willing speaker. But where a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 757 (1976). As the Court has further recognized, a consumer's interest in the free flow of commercial information "may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *Id.* at 763.

Finally, *amici* support First Amendment protection of truthful and nonmisleading price advertising. Price is one of the most important factors in comparative information about products and services, and newspaper advertising is often the best means of consumer access to this information. Purchasing decisions are made based on availability, price, and quality of goods and services. The ability of advertisers to disclose and consumers to receive price information is instrumental to making fully informed decisions. Governmental restrictions on the public availability of that information undermine not only the market for a particular product or service but also the debate about public policy issues concerning that product or service. Price information is " 'important for private economic decisions by those in need of [the particular] services. Such information is also helpful. perhaps indispensable, to the formation of an intelligent opinion by the public on how well the . . . system is working and whether it should be regulated or even altered.' " *Bates v. State Bar of Arizona*, 433 U.S. 350, 358 (1977) (quoting *In re Bates*, 113 Ariz. 394, 402, 555 P.2d 640, 648 (1976) (Holohan, J., dissenting)).

Restrictions on price advertising are thus directly contrary to the theory of free access to information on which our society is based. *Amici* urge the Court to forbid this paternalistic exercise of power by the State to influence its citizens' thoughts and behavior through public ignorance. Such state strategies must be subjected to the most vigilant judicial scrutiny to prevent otherwise inevitable governmental abuse.

SUMMARY OF ARGUMENT

This Court affords First Amendment protection to commercial speech as a valued part of the marketplace of ideas. Accordingly, the government bears a heavy burden to justify restraints on nonmisleading commercial speech concerning lawful products or services, particularly when those restraints represent the State's attempt to manipulate its citizens' behavior by depriving them of information

vital to fully-informed decisionmaking. The State must prove under *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980), that its restrictions directly advance a substantial State interest to a material degree and that those restrictions are not more extensive than necessary to advance that interest. Rhode Island has not carried that burden.

The State proffers only promoting "temperance" as its substantial interest in banning advertising of alcohol beverage prices. Reducing abuse of alcohol beverages due to individual over-consumption is a substantial interest, but the record shows that the State's price advertising ban does much to protect the members of Respondent Rhode Island Liquor Stores Association from competition, but little, if anything, to promote "temperance." This Court has already held that depriving consumers of information is not a proper means of dampening competition. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976).

The district court expressly found that the evidence the State introduced to prove that its price ban directly advances its purported interest in "temperance" falls far short of the mark. In contrast, the First Circuit used an attenuated series of presumptions—some of which the court helpfully provided itself—to uphold the ban. Not only does record evidence directly contradict these presumptions, but the First Circuit diluted commercial speech jurisprudence to the point of being unrecognizable. Direct and material advancement of a substantial interest is a matter of proof, not conjecture, and if the State cannot provide that proof, it cannot restrict commercial speech. *See, e.g., Florida Bar v. Went For It, Inc.*, No. 94-226, 1995 W.L. 365648 (1995); *Rubin v. Coors Brewing Co*, 115 S. Ct. 1585 (1995); *Edenfield v. Fane*, 113 S. Ct. 1792 (1993).

The State has also failed to prove its price advertising ban is no more extensive than necessary to achieve the

State's purported objective. There are numerous and obvious alternative means to the State's end that do not involve restrictions on speech, and the State did not even try to prove otherwise. The First Circuit's refusal to consider these alternatives flies in the face of the record and this Court's prior decisions. *See Rubin*, 115 S. Ct. at 1593-94; *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1510 n.13 (1993). The Twenty-first Amendment has no applicability to restrictions on speech protected by the First Amendment and neither lightens the State's burden of proof, nor provides any additional presumption of validity to the State's action.

The First Circuit's conclusion that Rhode Island's price advertising ban is one among other "reasonable" means of achieving the State's objective finds no support in the record and is squarely at odds with this Court's commercial speech jurisprudence. The State's speech ban is unconstitutional and should be struck down.

ARGUMENT

I. THE FIRST AMENDMENT STRONGLY PROTECTS COMMERCIAL SPEECH.

The Court first recognized the high value of commercial speech in *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). That case, like this one, involved a paternalistic regulatory scheme that prohibited advertising the price of a lawful product. In striking down that restriction, the Court observed that commercial speech is worthy of First Amendment protection for many of the same reasons that other forms of speech are protected:

> Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise

> economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered. Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decision-making in a democracy, we could not say that the free flow of information does not serve that goal.

Id. at 765 (citations omitted).

The Court has continued to find that "the free flow of commercial information is 'indispensable to the proper allocation of resources in a free enterprise system' because it informs the numerous private decisions that drive the system." *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585, 1589 (1995) (quoting *Virginia Pharmacy*, 425 U.S. at 765); *accord, e.g., City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1512 (1993) (commercial speech "serves individual and societal interests in assuring informed and reliable decisionmaking"); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 561-62 (1980) ("Commercial expression not only serves the economic interests of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information."). The Court thus has recognized that protection of commercial speech provides the public with unfettered and truthful information, affording the most effective foundation for informed decisionmaking in our open society by citizens who will " 'perceive their own best interests if only they are well enough informed.' " *Central Hudson*, 447 U.S. at 562 (quoting *Virginia Pharmacy*, 425 U.S. at 770).

Commercial speech, like political speech, thus plays an important and valued role in the First Amendment's free marketplace of ideas.

> The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish. Some of the ideas and information are vital, some of slight worth. But the general rule is that the speaker and the audience, not the government, assess the value of the information presented.

Edenfield v. Fane, 113 S. Ct. 1792, 1798 (1993). Accordingly, the Court has extended substantial constitutional protection for truthful commercial speech about lawful products and services, and its "decisions involving commercial speech have been grounded in the faith that the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful." *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 646 (1985); *accord Ibanez v. Florida Dept. of Business and Professional Regulation*, 114 S. Ct. 2084 (1994); *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989); *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 487 (1988). Government regulation of commercial speech is subject to searching evaluation by the courts, and the government bears substantial factual burdens to justify limits—especially bans—imposed on such speech. *E.g., Ibanez*, 114 S. Ct. 2084; *Edenfield*, 113 S. Ct. 1792.

The Court established a framework for judicial evaluation in *Central Hudson* and repeatedly has emphasized the vital role of the judiciary in holding government to its First Amendment burden of proof to justify restrictions on commercial speech. The government must prove that, (1) if the speech concerns a lawful product or service and is not false or misleading, (2) a real and substantial interest underlies the government's restriction on speech;

(3) the restriction directly advances the government's interest in a material way; and (4) the restriction is no more extensive than necessary to achieve that interest in light of available alternatives with less impact on speech. A restriction on commercial speech cannot survive the government's failure to satisfy its burden of proof on any one of these factors. *E.g., Rubin*, 115 S. Ct. at 1589.

The district court correctly found that Rhode Island failed to carry its burden of proof to defend its prohibition on alcohol beverage price advertising. The First Circuit disregarded the district court's careful and thorough analysis of the record evidence, gave only lip service to this Court's commercial speech jurisprudence, and essentially deferred to the State's asserted justification of its restraint of truthful, nonmisleading speech. This Court, therefore, is called on once again to reaffirm the importance of, and the protection afforded, commercial speech and to hold the government to its proper burden of proof —a burden that Rhode Island simply has not carried.

II. RHODE ISLAND'S ASSERTED "SUBSTANTIAL INTEREST" IS EXTREMELY LIMITED.

The first part of the *Central Hudson* inquiry is not implicated here. The parties and the lower courts all acknowledged that the speech at issue concerns a lawful product and is not false or misleading. *See 44 Liquormart, Inc. v. Rhode Island*, 39 F.3d 5, 6 (1st Cir. 1994), *cert. granted*, 63 U.S.L.W. 3783 (May 2, 1995). Indeed, with the exception of price tags on the merchandise itself, the challenged statute prohibits "advertising in any manner whatsoever of the price" of alcohol beverages, regardless of its verifiable truth or its utter lack of potential to mislead consumers. R.I. Gen. Laws § 3-8-7. The government, therefore, must be put to its proof under the remaining parts of the *Central Hudson* test.

Pursuant to the second *Central Hudson* factor, the parties stipulated that "the State of Rhode Island has a substantial interest in regulating the sale of alcoholic

beverages." *44 Liquor Mart, Inc. v. Racine*, 829 F. Supp. 543, 545 (D.R.I. 1993), *rev'd, 44 Liquormart*, 39 F.3d 5. A general interest in regulating the *sale* of alcohol beverages, however, bears no relationship to *speech* on that subject. *See Rubin*, 115 S. Ct. at 1590 n.2. The State further asserts that its interest in regulating alcohol beverage sales extends to fostering "temperance." *Id.* The statute embodying Rhode Island's price advertising ban nowhere uses—much less defines—"temperance," but the Rhode Island Supreme Court has interpreted the term in the context of the statute to mean " 'moderation in or abstinence from the use of intoxicating drink.' " *S & S Liquor Mart, Inc. v. Pastore*, 497 A.2d 729, 733 (R.I. 1985) (quoting *Webster's Third New International Dictionary* (1961)). The State further refined its interest in the district court below:

> [Q]uite frankly, Judge, the Liquor Control Administrator's emphasis here is not on responsible drinkers. Of course it's not. It's on people that have a very limited income, such as young people, people that don't have a lot of [money], college students who would pool their money, go through the newspaper, find out who's having the case sales, the keg sales, drive down to the liquor store and buy as much beer as they can. That's what this particular statute is designed for.

App. —— (Trial Transcript at 113).

Rhode Island's asserted substantial interest in fostering "temperance," therefore, is more specifically an interest in reducing abuse of alcohol beverages due to individual over-consumption. While such an interest is substantial, it is also very limited and expressly does not include reducing consumption of alcohol beverages by responsible adults. Nor could the State have a legitimate interest in favoring some retailers of alcohol beverages over others—an interest that apparently lies much closer to the heart of this price advertising ban than does any promotion of "temperance," as the participation of the Rhode Island

Liquor Stores Association in this case illustrates. *See Rhode Island Liquor Stores Ass'n v. Evening Call Publishing Co.*, 497 A.2d 331, 342 n.10 (R.I. 1985) (Murray, J., dissenting) ("The underlying motives of this case have nothing to do with the 'promotion of temperance' among Rhode Island citizens, but rather with the promotion of price ignorance. The plaintiff seeks to retain its members' market share by withholding price information from Rhode Island citizens.").

The State "must demonstrate that the harms it recites are real," *Edenfield*, 113 S. Ct. at 1800, and the Court "must identify with care the interests the State itself asserts." *Id.* at 1798. *Amici* do not doubt that the harms of alcohol abuse are real, but they seriously question whether the State's real interest in banning alcohol beverage price advertising is, in fact, to promote "temperance." Even accepting the State's purported justification, however, the State fails to satisfy the remaining two factors of the *Central Hudson* test.

III. RHODE ISLAND'S PRICE ADVERTISING BAN DOES NOT DIRECTLY ADVANCE THE STATE'S ASSERTED INTEREST TO A MATERIAL DEGREE.

The third *Central Hudson* factor requires that the State prove that its price advertising ban "directly advance[s] the state interest involved." 477 U.S. at 564. Based on the record evidence, the district court found as a matter of fact that the State had failed to prove that the ban had any significant impact on levels of alcohol consumption in Rhode Island. The First Circuit ignored the district court's findings and utilized presumptions rather than evidence to support the price advertising ban. The appellate court also employed only a "reasonableness" review of the price advertising ban, derived in large measure from its view of the Twenty-first Amendment. Presumptions, however, do not satisfy the State's burden of proof, and the Twenty-first Amendment is simply inapplicable. The State has not carried its burden to prove

that the price advertising ban directly advances the State's asserted interest in "temperance" to a material degree.

A. The State Must Prove as a Matter of Fact That the Price Advertising Ban Directly Advances a Substantial Governmental Interest.

This Court has made it abundantly clear that the State bears a heavy burden of proof to demonstrate as a matter of fact that restrictions on commercial speech directly advance a substantial government interest in a material way.

> [T]he Government carries the burden of showing that the challenged regulation advances the Government's interest "in a direct and material way." That burden "is not satisfied by mere speculation and conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."

Rubin, 115 S. Ct. at 1592 (quoting *Edenfield*, 113 S. Ct. at 1800); *accord Ibanez*, 114 S. Ct. at 2089. "Without this requirement, a State could with ease restrict commercial speech in the service of other objectives that could not thmselves justify a burden on commercial expression." *Edenfield*, 113 S. Ct. at 1800; *accord Rubin*, 115 S. Ct. at 1592.

The First Circuit acknowledged that the burden of proof is on the State, but asked "to what extent?" 39 F.3d at 7. The appellate court also posited the questions, "What should a court do if there is no empirical evidence either way and expert opinions go both ways? . . . Should the court be free to choose?" *Id.* The court observed that "[t]he district court held that it was an issue for it to decide, unfettered, between competing witnesses, and since, on its weighing the evidence, the court was not presuaded that the State was correct, it failed. We do not think the

burden that strict. It is not correctness, it is reasonableness." *Id.*

The First Circuit's analysis is inconsistent with this Court's commercial speech jurisprudence. The burden is indeed "that strict," and the district court employed the correct approach, recognizing the duty of the court to require the state of Rhode Island to prove, with specific admissible evidence, that the price ban directly and materially advances the asserted governmental interest. In addition to defining this First Amendment duty in *Rubin*, *Ibanez*, and *Edenfield*, the Court addressed this issue extensively in *Turner Broadcasting Sys. v. FCC*, 114 S. Ct. 2445 (1994), a noncommercial speech case that involved a challenge to "must-carry" regulations requiring cable television operators to transmit on their cable systems the over-the-air signals of local commercial and public broadcast stations. Even while observing that substantial deference was due to Congress' "unusually detailed statutory findings," *id.* at 2461, the Court "stressed in First Amendment cases that the deference afforded to legislative findings does 'not foreclose [the Court's] independent judgment of the facts bearing on an issue of constitutional law.'" *Id.* at 2471 (plurality op. of Kennedy, J.) (quoting *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 129 (1989)); *see also Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, No. 94-749, 1995 WL 360192 (1995). Exercising its independent judgment, the Court in *Turner Broadcasting* reversed the grant of summary judgment in favor of the government and remanded the case to the three-judge district court panel for additional judicial findings of fact:

> [U]nless we know the extent to which the must-carry provisions *in fact* interfere with protected speech, we cannot say whether they suppress "substantially more speech than . . . necessary" to ensure the viability of broadcast television. Finally, the record fails to provide any *judicial findings* concerning the availability and efficacy of "constitutionally

> acceptable less restrictive means" of achieving the Government's asserted interests.

Id. at 2472 (plurality op. of Kennedy, J.) (emphasis added and citation omitted) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989), and *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 129 (1989)).

The Court's recent commercial speech cases echo this requirement that the State must establish as a result of judicial fact-finding—not deference to legislative determination—that the challenged regulation directly advances a substantial State interest. *See Rubin*, 115 S. Ct. at 1593 ("anecdotal evidence and educated guesses" held insufficient to overcome "the weight of the record"); *Ibanez*, 114 S. Ct. at 2091-92; *Edenfield*, 113 S. Ct. at 1800.[1] Significantly, the plurality in *Turner Broadcasting* cited *Edenfield* for the proposition that in defending a regulation on speech designed "to redress past harms or prevent anticipated harms," the government "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner*

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[1] The Court's most recent commercial speech decision upheld a speech restriction but reinforced the requirement that the State satisfy its evidentiary burden to prove that the restriction directly and materially advances the State's substantial interest. *Florida Bar v. Went For It, Inc.*, No. 94-226, 1995 WL 365648 (June 21, 1995). "After scouring the record," the Court found the evidentiary "record mustered by the [State] is noteworthy for its breadth and detail" and was "at no time refuted, save by the conclusory assertion that the rule lacked 'any factual basis.'" *Id.* at 5-6. In that case, the State carried its burden of proof, like any other civil litigant, by producing admissible evidence that was uncontradicted by its opponents. Here, in sharp contrast, the State failed to produce credible evidence to support its speech ban and did not rebut its opponents' evidence showing no causal connection between price advertising and alcohol consumption or abuse. *See infra* pp. 15-20.

Broadcasting, 114 S. Ct. at 2470 (plurality op. of Kennedy, J.).

The Court thus has already answered the First Circuit's questions about the proper allocation of the burden of proof. The State must establish by a preponderance of the evidence that its restrictions on speech directly advance a substantial State interest in a material way. Where, as here, the State has proffered no empirical evidence to support any causal connection between its ban and any reduction in consumption or abuse, the State has failed to satisfy its burden of proof.[2] Courts must be especially vigilant to ensure that the State carries its evidentiary burden when the restrictions on speech represent a legislative attempt to overtly manipulate consumers through a ban on truthful speech about a legal product; a legislature that opts to manipulate its citizens' behavior through enforced ignorance must bear a particularly heavy burden to justify it. *See Bates v. State Bar of Arizona*, 433 U.S. 350, 375 (1977) ("we view as dubious any justification [for the suppression of commercial speech] that is based on the benefits of public ignorance"); *accord Virginia Pharmacy*, 425 U.S. at 769-70.[3]

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[2] Even in those limited circumstances in which a substantial State interest involves predictive policy judgments for which empirical support is not available, the courts' review at a minimum must "assure that, in formulating its judgments, [the legislature] has drawn reasonable inferences based on substantial evidence." *Turner*, 114 S. Ct. at 2471 (plurality op. of Kennedy, J.). As the evidence before the district court demonstrates, however, such limited circumstances in which empirical data could not be produced are not presented in this case, and even if they were, substantial evidence does not support the inferences on which the State and the First Circuit rely. *See infra* pp. 15-18.

[3] In *Florida Bar*, the Court upheld Florida's restrictions on certain direct mail solicitations, but distinguished and reaffirmed the Court's previous decisions invalidating restrictions "motivated primarily by paternalism." *Florida Bar*, 1995 WL 365648 at 7 n.2. Rhode Island's ban on truthful price advertising falls squarely within these prior cases and is indistinguishable from the restric-

The State's burden of proof, therefore, is not satisfied through judicial deference to the legislature's choice among alternatives it reasonably believes may advance its interests. Rather, courts must ensure that if the State attempts to foster even a substantial government interest by restricting constitutionally protected speech, it must prove that the restriction demonstrably advances the asserted interest. If the State cannot make that demonstration, its restriction fails under the First Amendment.

B. Rhode Island Has Not Proven That Its Price Advertising Ban Directly Advances the Promotion of "Temperance" in a Material Way.

Rhode Island failed to present any credible evidence to the trier of fact to prove that its ban on advertising the price of alcohol beverages directly advances "temperance." The State submitted only the testimony of a single expert witness, Henry Saffer, Ph.D., a professor of economics at Kean College in New Jersey, who "testified that alcohol advertising bans affect alcohol abuse." *44 Liquor Mart*, 829 F. Supp. at 548. Following a thorough review of this testimony, the district court concluded that the witness "did not, in any meaningful way, consider a number of variables that influence the public's consumption of alcohol." *Id.* The court also concluded that while the witness "knew that the national alcoholic beverage consumption trend for the past ten years has declined, he had no idea of what the trend has been in Rhode Island. Nor had he made any determination as to how much lower prices might be expected to go if the price advertising ban were lifted." *Id.* at 549. The studies on which Dr. Saffer based his testimony, moreover, addressed alcohol advertising in general, rather than price advertising in particular, and thus "did not deal with the

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tions that the Court struck down in *Virginia Pharmacy* because of their "highly paternalistic approach" of keeping consumers in ignorance. 425 U.S. at 770.

precise issues presented in this litigation." *Id.* As a whole, therefore, the court found Dr. Saffer's testimony unpersuasive. *Id.* at 548.

Witnesses who testified for the plaintiffs, on the other hand, testified that "there is no empirical evidence that the presence or absence of alcohol price advertising significantly affects levels of alcohol consumption." *Id.* at 546. Specifically with regard to price advertising, Reginald Smart, Ph.D., a scientist with the Addiction Research Foundation in Toronto, Canada, testified that he agreed with the authors of three different studies that focused on price advertising,

> which concluded that bans on price advertising have no effect on alcohol consumption. Dr. Smart used Rhode Island as a classic example of the fallacy of conclusions to the contrary. Rhode Island, a license state, which has a ban on alcohol price advertising, has a "fairly high level of alcohol consumption, about 2.86 gallons of absolute alcohol per person." It ranks in the upper 30 percent of the states in per capita consumption. In other license states that allow price advertising, alcohol consumption is lower.

Id. (citations omitted). Indeed, Dr. Smart testified that one such study " 'established quite clearly that for all states there was no relationship between a price ad ban and no price ad ban when it came to alcohol consumption.' " *Id.* at 547.

"Based on the record presented, [the district court found] as a fact that Rhode Island's off-premises liquor price advertising ban has no significant impact on levels of alcohol consumption in Rhode Island." *Id.* at 549. The court found that "[a]t best, price advertising is one factor among many that influence alcohol consumption patterns." *Id.* at 554. The district court correctly concluded based on these factual findings that the State failed to carry its burden of proof to show that its price

advertising ban directly advances its asserted interest in promoting "temperance." *Id.*

The First Circuit, however, ignored these factual findings in favor of a series of self-generated presumptions:

> [T]here would seem to be inherent merit in the State's contention that competitive price advertising would lower prices, and that with lower prices there would be more sales. We would enlarge on this. There are doubtless many buyers whose consumption is sometimes measured by their free money. If a buyer learns that plaintiffs charge less, is he not likely to go there, and then buy more? Correspondingly, if ignorant of lower prices elsewhere, will he not tend to buy locally, at the higher price, and thus buy less? Further, if Association members would fight plaintiffs' advertised prices, as they presage, by lowering their own, then, again, might there not be more buys?
>
> . . . . Advertising must be generally productive, or so much money would not be spent on it. We do not consider, in the absence of any affirmative contradiction to rely on, that the district court was free to hold [this inference] unreasonable.

44 Liquormart, 39 F.3d at 7-8 (citation omitted). The appellate court thereupon upheld Rhode Island's price advertising ban, shifting the burden of proof from the State to those challenging the speech restrictions and conclusively presuming a remarkable sequence of unproven "facts": (1) price advertising results in increased competition among liquor stores; (2) increased competition from price advertising lowers prices for alcohol beverages; (3) lower prices result in increased sales of alcohol beverages; (4) increased sales result in more consumption of alcohol beverages; and (5) increased consumption results in abuse of alcohol beverages.

Virtually no commercial speech would survive under the First Circuit's standard for judicial scrutiny of govern-

ment restrictions. Not only did the court contribute its own presumptions—which, like the State's presumptions, were unsupported by credible record evidence—but record evidence actually contradicted virtually all of the presumptions underlying the appellate court's decision. Dr. Smart testified that studies show overall prices for alcohol beverages were the same without regard to whether they are sold by State-controlled stores or licensed private retailers, and "States with price ad bans didn't have lower consumption than those who had no such ban." *44 Liquor Mart*, 829 F. Supp. at 547. This testimony was uncontradicted.[4] Indeed, the State's witness—an economist—"acknowledged that if a company could increase its market share by advertising prices, it could increase its own profits without affecting overall consumption." *Id.* at 549.

Thus, the record wholly undermines all but one of the First Circuit's "reasonable" presumptions and demonstrates that price advertising (1) does not necessarily lower prices for alcohol beverages, (2) does not increase overall consumption, and (3) may increase a retailer's profitability through acquiring more market share at the expense of its competitors, rather than as a result of an increase in overall consumption of alcohol beverages.

Tellingly, the only State presumption the record does not contradict is the one that undermines the reality of the State's asserted interest: price advertising will result in increased competition among liquor stores (but without affecting consumption). This presumption—or more accurately, fear—explains the participation of the Rhode Island Liquor Stores Association in this case. The obser-

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[4] The State's only attempt to counter this testimony came in the form of "evidence—although not directly focused on price advertising—that some research groups believe that alcohol advertising leads to increased overall consumption." *44 Liquor Mart*, 829 F. Supp. at 547. The State failed to rebut the fact that studies of actual experiences with price advertising in other states demonstrated the lack of any causal connection between price advertising and overall consumption.

vation of Rhode Island Supreme Court Justice Murray is as applicable now as it was ten years ago:

> Why does [the Rhode Island Liquor Store Association], an organization whose members earn their livelihood through the retail sale of intoxicating beverages, seek to enforce a statute that discourages the retail sale of those very same intoxicating beverages? I think the answer to this question goes to the heart of the issue of whether [Rhode Island's price advertising ban] does in fact further the state's purported goal of "promoting temperance" (which really means "discouraging the retail sales of intoxicating beverages"). Given the record before this court, and my conclusion that the burden of proof lies with [the Association], I can only conclude that [the statute] affects *patterns* of consumption, not *volume* of consumption. The Rhode Island Liquor Store Association is concerned, and understandably so, that the advertisements at issue in this case are costing its members customers. The underlying motives of this case have nothing to do with the "promotion of temperance" among Rhode Island citizens, but rather with the promotion of price ignorance. The [Association] seeks to retain its members' market share by withholding price information from Rhode Island citizens.

Rhode Island Liquor Stores Ass'n v. Evening Call Publishing Co., 497 A.2d 331, 342 n.10 (R.I. 1985) (Murray, J., dissenting) (emphasis in original).

The record evidence in this case fully supports Justice Murray's analysis of the true purpose underlying the price advertising ban. The Court is thus presented with yet another example of a state purporting to promote a substantial interest when in reality "restrict[ing] commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression." *Edenfield*, 113 S. Ct. at 1800. As this Court held in *Virginia Pharmacy*, the State legitimately may attempt to protect selected businesses from competition in various ways,

> But it may not do so by keeping the public in ignorance of the entirely lawful terms that competing [businesses] are offering. In this sense, the justifications [the State] has offered for suppressing the flow of . . . price information, far from persuading us that the flow is not protected by the First Amendment, have reinforced our view that it is.

425 U.S. at 770.

Rhode Island's ban on price advertising does not directly advance the State's purported interest in promoting "temperance," and is unconstitutional. *See, e.g. Central Hudson*, 447 U.S. at 564 ("the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose").

IV. THE PRICE ADVERTISING BAN IS MORE EXTENSIVE THAN NECESSARY TO ACHIEVE THE STATE'S ASSERTED INTEREST.

The State also fails to satisfy its burden under the forth *Central Hudson* factor to prove that its ban on alcohol price advertising is no more extensive than necessary to achieve its purported interest in promoting "temperance." The State contends that the ban is sufficiently tailored to its goal because it minimizes demand for alcohol beverages by "increas[ing] the 'search costs' of consumers and reduc[ing] the incidence of 'price wars' between retailers, thus providing an 'artificial floor' for liquor prices." *44 Liquor Mart*, 829 F. Supp. at 554. The district court specifically concluded that these "ends may be easily accomplished by direct regulation controlling the retail prices of alcoholic beverages." *Id.* at 555. According to the First Circuit, however, "This is not an answer; the State is entitled to a reasonable choice. This includes choice of method—it is not obligated to prove that some other method, *e.g.*, taxation, would be less effective." 39 F.3d at 7.

Once again, the district court maintained a firmer grasp on this Court's commercial speech jurisprudence than the First Circuit. Consideration of reasonable alternatives to

restrictions on speech is an integral part of the Court's analysis of the fit between the State's means and its ends. "[I]f there are numerous and obvious less-burdensome alternatives to the restriction of commercial speech, that is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable." *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1510 n.13 (1993); *see New York State Ass'n of Realtors, Inc. v. Shaffer*, 27 F.3d 834, 844 (2d Cir.) (rejecting commercial speech restrictions in light of government failure to prove that alternatives would be ineffective), *cert. denied*, 115 S. Ct. 511 (1994). Indeed, the Court recently found that the existence of such alternatives was dispositive of the inquiry under the fourth *Central Hudson* factor. *See Rubin*, 115 S. Ct. at 1593-94 ("We agree that the availability of these options, all of which could advance the Government's asserted interest in a manner less intrusive to respondent's First Amendment rights, indicates that [the speech restriction] is more extensive than necessary.").

The First Circuit's refusal to consider reasonable alternatives to Rhode Island's price advertising ban obviously resulted from the appellate court's misconstruction of this Court's "reasonableness" inquiry. The inquiry is whether it is reasonable to ban speech to achieve the State's objective in light of the availability of alternative means to that end, not whether the speech ban is one alternative among other reasonable measures. *See, e.g., Edenfield*, 113 S. Ct. at 1798.

Numerous and obvious less-burdensome alternatives to the State's price advertising ban exist. The State's asserted interest is to promote "temperance," which the State has defined to mean reducing abuse of alcohol beverages due to over-consumption. *See supra* pp. 8-9. The State can promote "temperance" far more effectively through additional speech (*e.g.*, public service announcements and community educational programs addressing alcohol abuse) than by banning disclosure of truthful

information. The State can also achieve its objective by directly regulating the retail sale of alcohol beverages (*e.g.*, enacting and enforcing laws restricting illegal sales and sales to persons obviously intoxicated). As discussed above, the State has failed to prove any causal connection between price and abuse of alcohol beverages, but even if such a cause-and-effect relationship could be proven, direct State control of the price of alcohol beverages, consistent with the antitrust laws, would be a more direct and effective way to regulate price levels than banning speech and would be neutral under the First Amendment.

The existence of these reasonable alternatives more than amply demonstrates that the price advertising ban is far more extensive than necessary to promote any "substantial" State interest in "temperance," particularly in light of the State's failure to produce any evidence to prove that the ban promotes "temperance" at all.[5] The State's attempt to achieve its purported goals through a ban on truthful, nonmisleading commercial speech "strikes at the heart of the First Amendment. This is because it is a covert attempt by the State to manipulate the choices of its citizens, not by persuasion or direct regulation, but by depriving the public of the information needed to make a free choice." *Central Hudson*, 447

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[5] Indeed, having failed to prove that its price advertising ban directly advances the State's purported interest in promoting "temperance," the State necessarily has also failed to satisfy its burden under the fourth *Central Hudson* factor. If a speech ban provides only ineffective or remote support for the State's objective, the ban by definition is more extensive than necessary to achieve the State's purported goal. *See, e.g., Edenfield*, 113 S. Ct. at 1800; *Central Hudson*, 447 U.S. at 564. In addition, this Court in *Rubin* rejected the relevance of the dictum in *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986), that the power to ban the product includes the power to ban speech advertising the product. *Rubin*, 115 S. Ct. at 1590 n.2. Both in footnote 2 and generally, *Rubin* supersedes the relaxed application of the *Central Hudson* test in *Posadas* which, in any event, has no bearing on the strict application of *Central Hudson* required in this situation.

U.S. at 574-75 (Blackmun, J., concurring). The State has failed to justify its blatant manipulation through public ignorance, and the advertising price ban accordingly violates the First Amendment.

V. THE TWENTY-FIRST AMENDMENT DOES NOT ALTER THE STATE'S BURDEN OF PROOF UNDER *CENTRAL HUDSON*.

The State nevertheless argued to the First Circuit that under the Twenty-first Amendment, the price advertising ban is entitled to an "added presumption" in favor of its validity, citing *California v. LaRue*, 409 U.S. 109 (1972).[6] The Court, however, recently rejected a similar argument by observing that "*LaRue* did not involve commercial speech about alcohol, but instead concerned the regulation of nude dancing in places where alcohol was served." *Rubin*, 115 S. Ct. at 1590 n.2.[7] To the extent

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[6] The State also cited *Queensgate Investment Co. v. Liquor Control Comm'n*, 433 N.E.2d 138 (Ohio), *appeal dismissed*, 459 U.S. 807 (1982), as a further basis for diluting the applicable standard for reviewing restrictions on commercial speech concerning alcohol beverages. By accepting review of this case, however, the Court has indicated that such restrictions raise a substantial federal question, regardless of how the Court's prior disposition of *Queensgate* has been interpreted. *Compare, e.g., 44 Liquor Mart*, 829 F. Supp. at 553 (Supreme Court's summary dismissal lacked reasoned opinion and involved distinguishable factual predicate) *with, e.g., 44 Liquormart*, 39 F.3d at 8 (summary dismissal has precedential effect and is factually indistinguishable). The Court's disposition in *Queensgate*, however, has been the source of significant confusion, and the Court should take this opportunity to clarify this issue. *See, e.g., Dunagin v. City of Oxford*, 718 F.2d 738 (5th Cir.) (en banc) (relying in part on *Queensgate* to justify application of a deferential *Central Hudson* standard to restrictions on alcohol beverage advertising), *cert. denied*, 467 U.S. 1259 (1984); *S & S Liquor Mart, Inc. v. Pastore*, 497 A.2d 729 (R.I. 1985) (same).

[7] The Court made this observation in the course of flatly rejecting the Government's argument that because alcohol beverages are potentially harmful products, advertising for these products should be subject to a lesser form of scrutiny than commercial speech concerning other products—a claim that the State has not made here.

that the State's argument maintains any vitality in light of *Rubin*, the Court has also found that the Twenty-first Amendment "primarily created an exception to the normal operation of the Commerce Clause," not a separate framework for analyzing restrictions on individual rights guaranteed by other constitutional provisions:

> Once passing beyond consideration of the Commerce Clause, the relevance of the Twenty-first Amendment to other constitutional provisions becomes increasingly doubtful. As one commentator has remarked: "Neither the text nor the history of the Twenty-first Amendment suggests it qualifies individual rights protected by the Bill of Rights and the Fourteenth Amendment where the sale or use of liquor is concerned."

Craig v. Boren, 429 U.S. 190, 206 (1976) (quoting PAUL BREST, PROCESSES OF CONSTITUTIONAL DECISIONMAKING, CASES AND MATERIALS 258 (1975)).

The Court has consistently concluded that the Twenty-first Amendment does not alter the standards for assessing the constitutional validity of government action infringing individual rights. *See id.* at 207 ("the Court has never recognized sufficient 'strength' in the [Twenty-first] Amendment to defeat an otherwise established claim of invidious discrimination in violation of the Equal Protection Clause"); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971) (same for Due Process Clause). The Court reached the same conclusion in the context of the First Amendment's Establishment Clause. *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 122 n.5 (1982).

The Court addressed the nature of a State's exercise of Twenty-first Amendment authority through restrictions on commercial speech in *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984). In that case, Oklahoma required local cable television systems to delete advertisements for certain alcohol beverages when retransmitting out-of-state signals within Oklahoma. The Court held that Oklahoma's interest in discouraging alcohol consumption

by retricting some (but not all) advertising was "modest," and "engage[d] only indirectly the central power reserved by § 2 of the Twenty-first Amendment—that of exercising 'control over whether to permit importation or sale of liquor and how to structure the liquor distribution system.'" *Id.* at 715 (quoting *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980)). The Court found that such "indirect" exercise of Twenty-first Amendment authority was outweighed simply by a federal statute intended to ensure widespread availability of diverse cable television services, *id.* at 715-16; the end result in *Capital Cities* would have been even clearer had the Court reached the issue of weighing Oklahoma's ban against the Constitutional provision insuring freedom of speech.

The state regulations upheld in *LaRue* and subsequent cases thus were exercises of literal Twenty-first Amendment power to regulate the conditions for alcohol sales on licensed premises and only indirectly regulated marginally "expressive" conduct. Indeed, the "critical fact" to the Court in *LaRue* was that the State "has not forbidden these performances across the board. It has merely proscribed such performances in establishments that it licenses to sell liquor by the drink." *LaRue*, 409 U.S. at 118; *see id.* at 119-20 (Stewart, J., concurring). *LaRue* and its progeny thus stand "not for the proposition that the twenty-first amendment overrides the first but for the more modest notion that twenty-first amendment power over alcohol consumption is broad enough to embrace state power to zone strong sexual stimuli away from places where liquor is served." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-24, at 478 n.15 (2d ed. 1988); *accord Michigan Beer & Wine Wholesalers Ass'n v. Attorney General*, 142 Mich. App. 294, 308-09, 370 N.W.2d 328, 335 (1985), *cert. denied* 479 U.S. 939 (1986). State restrictions on commercial speech must be evaluated under the *Central Hudson* factors regardless of the product or service that speech concerns. *Rubin*, 115 S. Ct. at 1590 n.2.

CONCLUSION

Government manipulation of its citizens through public ignorance is anathema to our system of government, which depends on fully-informed citizen decisionmaking to function properly. Rhode Island nevertheless seeks to influence the public's behavior by withholding truthful, nonmisleading information about the price of legal products. Yet, the State has failed to prove—as it must—that such drastic action advances its purported interest in fostering "temperance," much less that its ban on speech is no more extensive than necessary to achieve that goal in light of the availability of numerous and more effective alternatives that do not implicate free speech rights. Rhode Island's ban on advertising the price of alcohol beverages, therefore, violates the First Amendment and should be struck down.

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APPENDIX

Identity of Individual *Amici*

The Newspaper Association of America ("NAA") represents approximately 1,525 daily newspapers representing more than 90 percent of the newspaper circulation in the United States. NAA membership also includes a substantial number of non-daily U.S. newspapers.

A.H. Belo Corporation, through its subsidiaries, owns daily and weekly newspapers in the Dallas-Forth Worth metropolitan area, seven network-affiliated television stations in markets throughout the United States, and is majority owner of an international video syndication and distribution business.

Advance Publications, Inc., directly or through subsidiaries, publishes 26 newspapers in 24 cities throughout the United States, as well as sixteen national magazines. It also owns a major book publishing company, Random House, Inc.

The Copley Press, Inc., publishes *The San Diego Union-Tribune* and nine other daily newspapers in California and Illinois, whose combined circulation is approximately 750,000.

Cox Newspapers, Inc., a subsidiary of Cox Enterprises, Inc., is the parent company of daily newspaper publishers in 15 cities. Combined with Cox Enterprises' *Atlanta Journel & Constitution*, these newspaper publishers have a total daily circulation of 1,244,573 and a combined Sunday circulation of 1,735,204. Cox Newspapers, Inc., also is a parent corporation of six weekly publishers with a combined circulation of 455,500, as well as advertising distribution and book publishing companies.

Donrey Media Group publishes 51 daily newspapers and 51 non-daily publications in 17 states. The Donrey newspapers have an average daily paid circulation of

768,379. The company also operates ten outdoor advertising companies and five cable television companies.

Dow Jones & Company, Inc. publishes, *inter alia, The Wall Street Journal*, the largest circulation daily newspaper in the country, as well as *Barron's National Business and Financial Weekly, the Dow Jones News Services* and, through its Ottaway Newspapers, Inc. subsidiary, newspapers in 29 communities in 13 states.

The Hearst Corporation is a diversified privately held communications company. It publishes numerous nationally distributed consumer magazines, daily and non-daily newspapers, business publications and hard-cover and soft-cover books. It also owns and operates a leading features syndicate and several television and radio broadcast stations.

The New York Times Company publishes, *inter alia, The New York Times*, a daily newspaper with a national circulation of 1.15 million daily and 1.75 million on Sunday. The company also publishes *The Boston Globe*, 27 regional newspapers and 10 national sports/leisure magazines; operates six network-affiliated television stations and two radio stations; and runs a number of wire services and news and feature syndicates, and various electronic publishing activities.

Providence Journal Company publishes *The Providence Journal-Bulletin*, the largest circulation newspaper in Southern New England, owns or partially owns and operates nine broadcast television stations in geographically diverse markets, and owns or partially owns and operates cable television systems serving approximately 750,000 subscribers in nine states.

Thomson Newspapers Holdings, Inc., publishes 104 daily and 31 weekly newspapers in 30 states, largely in smaller and medium-sized towns and cities, and operates a national news service out of Washington.

Tribune Company is a communications company owning the *Chicago Tribune*, Orlando *Sentinel*, the Fort Lauderdale *Sun-Sentinel*, the Escondido, California *Times-Advocate*, the Palo Alto *Times-Tribune*, the Newport *News*, Virginia *Daily Press*, and television stations in Chicago, New York, Los Angeles, Denver, Atlanta, New Orleans, and Philadelphia.

Supreme Court, U.S.
FILED
JUL 6 1995
CLERK

(13)

No. 94-1140

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

44 LIQUORMART, INC., *et al.*,
Petitioners,

v.

STATE OF RHODE ISLAND, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF *AMICI CURIAE* OF THE WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. Under *Ibanez*, truthful, non-misleading commercial speech may not be banned 5

II. The First Amendment prohibits the government from banning or restricting truthful, non-misleading commercial speech as a means of regulating the lawful choices that consumers make in the marketplace 6

A. Limiting speech as an indirect means of regulating conduct is anathema to the First Amendment 6

B. The Court should overrule *Posadas* to the extent that it approved the curtailment of otherwise protected speech as an indirect means of regulating conduct 15

III. The First Amendment requires the government to justify a restriction on commercial speech by a preponderance of the evidence, and the facts claimed to support the restriction must be subject to *de novo* judicial review 18

A. The government bears a heavy burden of justification under the third and fourth prongs of the *Central Hudson* test 18

B. Rhode Island has failed to carry its burden of justification and the court below abdicated its essential reviewing function 19

CONCLUSION 24

TABLE OF AUTHORITIES

CASES: **Page**

44 Liquormart, Inc. v. Rhode Island,
39 F.3d 1 (1st Cir. 1994) . . . . . *passim*

44 Liquormart, Inc. v. Racine,
829 F. Supp. 543 (D.R.I. 1993) 7

Abrams v. United States, 250 U.S. 616 (1919) 8

Adarand Constructors, Inc. v. Pena,
63 U.S.L.W. 4523 (U.S. June 12, 1995) 17

Bates v. State Bar, 433 U.S. 350 (1977) 10

Bolger v. Youngs Drug Products Corp.,
463 U.S. 60 (1983) 11

Carey v. Population Services International,
431 U.S. 678 (1977) 11

Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557 (1980) . . *passim*

City of Cincinnati v. Discovery Network, Inc.,
113 S. Ct. 1505 (1993) 19, 22

Edenfield v. Fane, 113 S. Ct. 1792 (1993) . . . . *passim*

First National Bank of Boston v. Bellotti,
435 U.S. 765 (1978) 11

Florida Bar v. Went For It, Inc.,
No. 94-226 (June 21, 1995) . . . . . *passim*

Friedman v. Rogers, 440 U.S. 1 (1978) 11

Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, No. 94-749 (June 19, 1995) 23

Ibanez v. Florida Dep't of Business and Professional Regulation,
114 S. Ct. 2084 (1994) . . . . . *passim*

Linmark Associates, Inc. v. Township of Willingboro,
431 U.S. 85 (1977) 10

Metromedia, Inc. v. City of San Diego,
453 U.S. 490 (1981) 11

New York Times v. Sullivan,
376 U.S. 254, 270 (1964) 14

Ohralik v. Ohio State Bar Association,
436 U.S. 447 (1978) 5

Peel v. Attorney Registration and Disciplinary Comm'n, 496 U.S. 91, 105 (1990) 12

Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico, 478 U.S. 328 (1986) . . *passim*

Rubin v. Coors Brewing Co.,
115 S. Ct. 1585 (1995) . . . . . *passim*

Sable Communications of California, Inc. v. FCC,
109 S. Ct. 2829 (1989) 23

Swift & Co. v. Wickham, 382 U.S. 111 (1965) . . . 17

Trustees of the State University of New York v. Fox,
492 U.S. 469 (1989) 21

Turner Broadcasting System, Inc. v. FCC,
114 S. Ct. 2445 (1994) 23, 24

United States v. Associate Press,
52 F. Supp. 362 (S.D.N.Y.) (L. Hand, J.),
aff'd, 326 U.S. 1 (1945) 13-14

United States v. Dixon, 113 S. Ct. 2849 (1993) . . . 17

*Virginia State Board of Pharmacy v. Virginia
Citizens Consumer Council, Inc.*,
425 U.S. 748 (1976) . . . . . *passim*

Washington Legal Foundation v. Kessler, No. 94 CV 01306
(D.D.C., filed June 13, 1994) 2

Whitney v. California,
274 U.S. 357 (1927) 14

CONSTITUTION AND STATUTES:

U.S. Const., Amend. I . . . . . *passim*

R.I. Gen. Laws §§ 3-8-7 and 3-8-8.1 . . . . . 6, 7

R.I. Gen. Laws §§ 3-8-7 and 3-8.8.1 . . . . . 6, 7

MISCELLANEOUS:

P. Kurland, *Posadas de Puerto Rico v. Tourism Company*: "'Twas Strange, 'Twas Passing Strange; 'Twas Pitiful, 'Twas Wondrous Pitiful," 1986 *Supreme Court Review* 1. 17

N.Y. Times, Feb. 22, 1987 17

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BRIEF AMICI CURIAE OF THE WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST

The Washington Legal Foundation ("WLF") is a non-profit public interest law and policy center with more than 100,000 supporters nationwide. While WLF engages in

litigation and the administrative process in a variety of areas, WLF also devotes a substantial portion of its resources to promoting commercial free speech rights. To that end, WLF has appeared before this Court and other courts in numerous cases dealing with commercial speech issues, including, most recently *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585 (1995). *See also Washington Legal Foundation v. Kessler*, No. 94 CV 01306 (D.D.C., filed June 13, 1994) (challenge to the Food and Drug Administration's policy banning the dissemination of certain truthful and non-misleading information concerning drugs and medical devices to the medical community).

The Allied Educational Foundation ("AEF") is a non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, including law and public policy. AEF has appeared before this Court along with WLF as an amicus curiae in constitutional cases. *See, e.g., Simon & Shuster, Inc. v. Members of the New York State Crime Victims Board*, 112 S. Ct. 501 (1991).[1]

SUMMARY OF ARGUMENT

1. Just last year, in *Ibanez v. Florida Department of Business and Professional Regulation*, 114 S. Ct. 2084 (1994), this Court stated that only commercial speech that is false, deceptive, or misleading can be *banned*. The

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[1] Letters of consent to the filing of this brief from counsel for the parties have been filed with the Clerk of this Court.

alcohol beverage price advertising that Rhode Island has prohibited is concededly truthful and non-misleading. Under *Ibanez*, therefore, Rhode Island's price advertising ban violates the First Amendment.

2. Even if the categorical language of *Ibanez* is put to the side, Rhode Island has failed to demonstrate that its price advertising ban is justified under the four-part test established by this Court in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980).

a. Under the second prong of the *Central Hudson* test, a restriction on commercial speech must serve a "substantial" governmental interest. In this case, Rhode Island aims to protect consumers by keeping them in the dark. Its purpose is to shield consumers from truthful, non-misleading commercial information the State fears they will "mishandle." This is not even a legitimate governmental interest, much less a "substantial" one. Such paternalism is "anathema to the First Amendment." *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585, 1597 (1995) (Stevens, J., concurring in the judgment).

As the Court has recognized in case after case, the First Amendment assumes that people are capable of perceiving their own best interests, and it prohibits the government from pursuing its objectives, however benevolent, by means that rely on public ignorance. The First Amendment does not allow the government to ban or restrict otherwise protected commercial speech as a means of regulating the lawful choices that consumers make. To the extent that *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986), is to the contrary, it should be overruled.

b. Even assuming that Rhode Island's purpose in this case is not forbidden, the State has failed to meet its burden of justification under the third and fourth prongs of the *Central Hudson* test. The State has failed to demonstrate that its ban on alcohol beverage price advertising "directly and materially" promotes "temperance" and is not more extensive than necessary to achieve that purpose. The court below abdicated its review function both in accepting Rhode Island's unsubstantiated assertions regarding the efficacy of its price advertising ban, and in deprecating the availability of obvious alternatives that do not entail the suppression of speech.

If the First Amendment's protection of commercial speech is to be meaningful, then, when commercial speech is restricted, the government must be required to demonstrate, by a preponderance of the evidence adduced at trial, that the restriction "will in fact" directly and materially advance the government's asserted interests, and is not more extensive than necessary. *Edenfield v. Fane*, 113 S. Ct. 1792, 1800 (1993). As in a noncommercial speech case, the factual determinations claimed to support a content-based commercial speech restriction must be subject to *de novo* judicial review. Absent such judicial scrutiny, the courts are mere rubber stamps and the First Amendment's promise of protection for commercial speech cannot be honored.

ARGUMENT

I. UNDER *IBANEZ*, TRUTHFUL, NON-MISLEADING COMMERCIAL SPEECH MAY NOT BE BANNED.

The question on which review was granted is "[w]hether Rhode Island may, consistent with the First Amendment, prohibit truthful, non-misleading price advertising regarding alcoholic beverages." With respect, this question has already been answered. Two years ago, the Court stated categorically that commercial speech that is not false, deceptive, or misleading can be *restricted*, but "only false, deceptive, or misleading commercial speech may be *banned*." *Ibanez v. Florida Department of Business and Professional Regulation*, 114 S. Ct. 2084, 2088 (1994) (emphasis added) (citations omitted).

The rule stated in *Ibanez* reflects a recognition, firmly grounded in the Court's commercial speech cases and its general First Amendment jurisprudence, that knowledge itself can never be harmful. Commercial speech that is not false, deceptive, or misleading may not be deemed injurious in and of itself, and thus subject to absolute suppression. Any harms thought to be posed by such speech must be related to the *circumstances or conditions* under which the speech is uttered, and so must be avoided through restrictions short of a ban that leave "ample alternative channels for receipt of information." *Florida Bar v. Went For It, Inc.*, No. 94-226, slip op., at 16 (June 21, 1995); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 457 & n.13 (1978).

The speech at issue in this case — alcohol beverage price advertising — is concededly truthful and non-

misleading, and the prohibition imposed by R.I. Gen. Laws §§ 3-8-7 and 3-8-8.1 constitutes a ban under any meaningful definition of that term.[2] As discussed below, the premise of Rhode Island's advertising ban is that knowledge of alcohol beverage prices can indeed be harmful. Thus, under *Ibanez*, Rhode Island's prohibition of truthful, non-misleading alcohol beverage price advertising violates the First Amendment.

II. THE FIRST AMENDMENT PROHIBITS THE GOVERNMENT FROM BANNING OR RESTRICTING TRUTHFUL, NON-MISLEADING COMMERCIAL SPEECH AS A MEANS OF REGULATING THE LAWFUL CHOICES THAT CONSUMERS MAKE IN THE MARKETPLACE.

A. Limiting Speech as an Indirect Means of Regulating Conduct Is Anathema to the First Amendment.

Under the second prong of the *Central Hudson* test, commercial speech may be restricted only in the service of a "substantial" governmental interest. *See Florida Bar v. Went For It, Inc., supra*, slip op., at 5; *Coors, supra*, 115 S. Ct. at 1589. Under the First Amendment, Rhode Island's purpose in prohibiting alcohol beverage adver-

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[2] The state law prohibits in the most sweeping terms "the advertising in any manner whatsoever of the price of any [alcohol beverage] offered for sale in this state." Section 3-8-7 does include a necessary exception for "price signs or tags attached to or placed on merchandise for sale within the licensed premises," but that limited exception is surely not significant enough to permit the State's prohibition to be characterized as a mere "restriction," rather than a "ban."

tising, which assumes that knowledge can be harmful, is not even legitimate, much less "substantial."

1. Rhode Island asserts that the purpose of R.I. Gen. Laws §§ 3-8-7 and 3-8.8.1 is to promote "temperance," which the State defined at trial as avoiding abusive consumption of alcohol beverages (*see* Trial Tr. at 113), and which the court below understood to mean reducing consumption of alcohol beverages generally. *44 Liquormart, Inc. v. Rhode Island*, 39 F.3d 1, 7-8 (1st Cir. 1994). Whichever characterization is accepted as a description of the State's ultimate objective, both obscure the precise nature of the "harm" the State seeks to avoid — a consumer response to truthful, non-misleading information that the State fears will be unwise.

The State explained that its ban on alcohol beverage price advertising promotes "temperance" in two ways. First, by making it difficult for consumers to identify the retailers that offer alcohol beverages at the lowest prices, the State prevents consumers from getting "more" for their money, which the State appears to equate with excessive consumption. Second, by preventing retailers from communicating price information to consumers, the State hopes to discourage retailers from competing with one another on the basis of price and thereby to keep prices high. The State assumes that, if alcohol beverage prices are lowered and consumers are made aware of that fact, excessive consumption would rise. *See* Defendant's Post Trial Memorandum at 5-6, quoted in *44 Liquormart, Inc.* v. *Racine*, 829 F. Supp. 543, 548 (D.R.I. 1993).

In either case, the State's concern is not to ensure "that the stream of commercial information flow[s] cleanly as well as freely," *Virginia State Board of Pharmacy v.*

Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 772 (1976), but to forestall an anticipated consumer response to alcohol beverage price information. This is the exact "harm" at which Rhode Island's price advertising ban is directed. Thus, for purposes of analyzing the ban under the second prong of the *Central Hudson* test, it is appropriate to view the State's "interest" as an interest in keeping consumers uninformed for their own protection, in shielding them from truthful information the State fears they will "misuse." *See Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585, 1597 (1995) (Stevens, J., concurring in the judgment).[3] Such an interest, however, is impermissible under the First Amendment.

2. More than 75 years ago, Justice Holmes urged that political speech should be given meaningful First Amendment protection because "the ultimate good desired" is best reached through "free trade in ideas." "[T]he best test of truth," he famously wrote, "is the power of thought to get itself accepted in the competition of the market." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., joined by Brandeis, J., dissenting). Thus was born the metaphor of the "marketplace of ideas."

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[3] The fact that a reviewing court may not "supplant the precise interests put forward by the State with other suppositions," *Edenfield, supra*, 113 S. Ct. at 1798, does not mean that the court cannot discern for itself, from the manner in which the State has acted, the true nature of the State's aims. *See Virginia State Board of Pharmacy*, 425 U.S. at 769 ("close examination" of state board's justifications for prescription drug price advertising ban reveals that "the State's protectiveness of its citizens in large measure rests on the advantages of their being kept in ignorance").

The metaphor is powerful because it invokes the ideal of a *commercial* marketplace in which *products* survive or fail based on their appeal (or lack of appeal) to "intelligent and well informed consumers." *See Virginia State Board of Pharmacy, supra,* 425 U.S. at 765. Ironically, it was not until 1976 that the Court formally extended First Amendment protection to the commercial marketplace itself. But when the Court did — in a decision striking down a prohibition against prescription drug price advertising — it did so for the same basic reasons that Justice Holmes urged that First Amendment protection be afforded to speech in the political sphere.

Thus, in *Virginia State Board of Pharmacy,* the Court identified three distinct rationales, in addition to the speaker's "right to advertise," 425 U.S. at 757, for extending First Amendment protection to "dissemination of information as to who is producing and selling what product, for what reason, and at what price." *Id.* at 765. *First*, the Court observed, "the proper allocation of resources" in our free enterprise system demands that consumer decisions be "intelligent and well informed." *Id. Second*, the Court noted that unless consumers are kept informed about the operations of the free market system, they cannot form "intelligent opinions as to how that system ought to be regulated or altered." *Id. Third*, and most important, the Court interpreted the First Amendment as precluding the government from suppressing commercial speech out of a concern that consumers, once informed, will fail to perceive their own best interests:

> There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best

> interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them. * * * It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.

Id. at 770.

The Court has since invoked these principles in case after case. In *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 96-97 (1977), the Court stated that the "basic" constitutional defect of an ordinance seeking to prevent white flight by forbidding the posting of "For Sale" and "Sold" signs in residential neighborhoods was its attempt to manipulate the choices of the township's residents by preventing them from obtaining information. In *Bates v. State Bar*, 433 U.S. 350, 375 (1977), the Court held a lawyer advertising restriction unconstitutional because, among other things, it rested on "the benefits of public ignorance." *See also id.* at 364-65 (stressing the "individual and societal interests" served by commercial speech "in assuring informed and reliable decision-making").

In *Central Hudson*, the Court stated:

> Commercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information. In applying the First Amendment to this area, we have rejected the 'highly paternalistic' view that government has complete power to suppress or

> regulate commercial speech. '[P]eople will perceive their own best interests if only they are well enough informed, and * * * the best means to that end is to open the channels of communication rather than to close them. * * *' Even when advertising communicates only an incomplete version of the relevant facts, the First Amendment presumes that some accurate information is better than no information at all.

447 U.S. at 561-62 (citations omitted). And in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 505 (1981), the plurality — echoing *Virginia State Board of Pharmacy*, 425 U.S. at 773 — reiterated that the government "may not completely suppress the dissemination of truthful information about an entirely lawful activity merely because it is fearful of that information's effect upon * * * its recipients."[4]

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[4] Although this statement appeared in a plurality opinion, the principle was endorsed by a majority of the Court. *See id.* at 541 (Stevens, J., dissenting). *See also Carey v. Population Services Int'l*, 431 U.S. 678, 700 (1977) (noting "'substantial individual and societal interests' in the free flow of commercial information"); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978) (commercial speech cases "illustrate that the First Amendment goes beyond protection of the press and self-expression to prohibit the government from limiting the stock of information from which members of the public may draw"); *Friedman v. Rogers*, 440 U.S. 1, 8-9 (1978) (noting society's "strong interest in the free flow of commercial information"); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 79 (1983) (Rehnquist, J., joined by O'Connor, J., concurring in the judgment) (invoking anti-paternalism principle

(continued...)

More recently, in *Edenfield*, the Court once again emphasized "the societal interests in broad access to complete and accurate commercial information that First Amendment coverage of commercial speech is designed to safeguard," 113 S. Ct. at 1798, and the Court again condemned paternalistic justifications for restrictions on commercial speech:

> The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish. Some of the ideas and information are vital, some of slight worth, but the general rule is that the speaker and the audience, not the government, assess the value of the information presented.

Id.

Just last Term, in *Coors*, the Court reaffirmed that "the free flow of commercial information is 'indispensable to the proper allocation of resources in a free enterprise system' because it informs the numerous private decisions that drive the system." 115 S. Ct. at 1589. And in *Florida Bar v. Went For It, Inc.*, No. 94-226 (June 21, 1995), the Court, while upholding a restriction on lawyer advertising, pointedly disclaimed approval of commercial speech restrictions "motivated primarily by paternalism." Slip op., at 13 n.2. *See also Peel v. Attorney Registration and Disciplinary Comm'n*, 496 U.S. 91, 105 (1990) (plurality opinion) ("We reject the paternalistic assumption that the recipients of petitioner's letterhead are no more

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[4] (...continued)
of *Virginia State Board of Pharmacy*).

discriminating than the audience for children's television.").

3. In the instant case, Rhode Island has decided that the marketplace ideal invoked by Justice Holmes 75 years ago, and subsequently embraced by this Court, is flawed. The State has determined that consumers *cannot* be permitted to make their own choices, that commercial speech must be restricted because consumers, though informed, cannot "perceive their own best interests." *Virginia Board of Pharmacy, supra*, 425 U.S. at 770.

Rhode Island's paternalistic purpose is incompatible with the reasoning that led the Court to extend First Amendment protection to commercial speech. No distinctions exist that might allow the government to "protect" people by keeping them in ignorance when choosing among goods and services, but not when choosing among ideologies. If people cannot be counted on to perceive "their own best interests" in the marketplace of goods, why may they be counted on to perceive their own best interests in the marketplace of ideas? If the free flow of information about goods and services cannot be presumed to lead to "the ultimate good desired" in the realm of commerce, why should it be supposed that "free trade in ideas" can produce beneficial results in the political realm?

The First Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all." *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y.)

(L. Hand, J.), *aff'd*, 326 U.S. 1 (1945), *quoted in New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

Tolerating Rhode Island's experiment in information control thus has implications that go well beyond the commercial speech setting. People either are capable of discerning their own best interests or they are not. If people cannot perceive their own best interests in the realm of commerce, the supposition that they can do so in the realm of politics is also in error. But it would be fundamentally inconsistent with the First Amendment to suppress political speech on the assumption that people cannot perceive "their own best interests." It is no less fundamentally inconsistent with the First Amendment, as this Court recognized in *Virginia State Board of Pharmacy*, to suppress commercial speech on that paternalistic assumption.

If Rhode Island desires to keep prices for alcohol beverages high in order to dampen consumption, it should be required to muster, through open political debate, the support required to do so directly, through a system of price controls. The State should not be permitted to avoid the rigors of democratic decisionmaking by acting indirectly (and covertly), by imposing restrictions on speech that the State hopes will have the effect of keeping prices high — the result of "silence coerced by law." *Whitney v. California*, 274 U.S. 357-76 (1927) (Brandeis, J., joined by Holmes, J., concurring).

In short, the governmental interest asserted by Rhode Island to support its alcohol beverage price advertising ban is illegitimate under the First Amendment. The ban thus must be held to fail the second prong of the *Central Hudson* test.

B. The Court Should Overrule *Posadas* To the Extent That It Approved the Curtailment of Otherwise Protected Speech as an Indirect Means of Regulating Conduct.

In the teeth of the very principles that led it to extend First Amendment protection to commercial speech, the Court on one occasion has upheld a restriction on truthful, non-misleading commercial speech intended to influence consumer choices in the marketplace. In *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986), the Court sustained a Puerto Rico statute that banned advertising of casino gambling directed to the local residents in order to reduce demand for casino gambling by such persons.[5]

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[5] The Court has seemed to assume the legitimacy of such manipulativeness for the purposes of its analysis in two other commercial speech cases, but this assumption was not necessary to the Court's holding in either case. Indeed, in both cases, the Court invalidated the challenged commercial speech restriction.

One of these cases was *Central Hudson* itself. The regulation challenged in that case prohibited promotional advertising by utilities in order to reduce energy consumption. The Court invalidated the regulation as more extensive than necessary to achieve this goal. Significantly, although the Court assumed the legitimacy of restricting speech to influence consumer behavior for the purposes of its analysis, the Court also emphasized the anti-paternalism rationale underlying First Amendment protection for commercial speech. 447 U.S. at 561-62. That rationale, however, is inconsistent with paternalistic objectives, as three members of the Court observed in concurring opinions. *See* 447 U.S. at 572 (Brennan, J., concurring in the judgment); *id.* at 573

(continued...)

Notably, the Court sustained the statute challenged in *Posadas* without any discussion of the fundamental issues raised by the Commonwealth's paternalistic motives. Three of the dissenting Justices, however, sharply criticized the Court's decision as incompatible with the rationale of *Virginia State Board of Pharmacy* and its progeny, including its basic rejection of restrictions on speech resting on the "benefits" of public ignorance. *See id.* at 350-51 (Brennan, J., joined by Marshall and Blackmun, JJ., dissenting). *See also id.* at 360 n.1 (Stevens, J., joined by Marshall and Blackmun, JJ., dissenting) (assessing possible consequences of "too much speech").

The dissenters were right. As Professor Philip B. Kurland noted at the time, *Posadas* was "inconsistent with

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[5] (...continued)
(Stevens, J., joined by Blackmun, J., concurring in the judgment)).

The other case was this Court's recent decision in *Coors*. The statute at issue in that case, which prohibited the display of alcohol content in malt beverage labeling, was viewed as intended to avoid "strength wars" that might stimulate consumption of malt beverages. The Court invalidated the statute under the third and fourth prongs of the *Central Hudson* test without questioning the legitimacy of the government's goal of trying to avoid strength wars by suppressing alcohol content information. Again, even as the Court seemed to assume the legitimacy of curtailing speech to influence behavior, it emphasized the indispensability of "the free flow of commercial information." 115 S. Ct. at 1589. *See id.* at 1594 (Stevens, J., concurring in the judgment). As in *Central Hudson*, the legitimacy *vel non* of the government's paternalistic aim was not a deciding factor in the case.

everything that [had] gone before."[6] Certainly *Posadas* is inconsistent with the rule stated in *Ibanez* and the anti-paternalism principles expressed in *Edenfield* and *Florida Bar v. Went For It, Inc.* *Posadas* cannot be reconciled with the principles of economic efficiency, democratic self-governance or individual autonomy in a free and open society, principles on which the First Amendment's protection for commercial speech rests.

The Court cannot have meant to repudiate those principles without discussion. To the contrary, as discussed above, the Court has reaffirmed those principles in subsequent cases. Both as a basis for reversing the judgment below, and to avoid misunderstanding and confusion in future cases, *Posadas* should now be overruled to the extent that it approved the curtailment of otherwise protected commercial speech as a means of manipulating lawful consumer behavior.[7]

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[6] *N.Y. Times*, Feb. 22, 1987, § E, p. 9. *See also* P. Kurland, Posadas de Puerto Rico v. Tourism Company: "'Twas Strange, 'Twas Passing Strange; 'Twas Pitiful, 'Twas Wondrous Pitiful," 1986 *Supreme Court Review* 1.

[7] *Cf. Adarand Constructors, Inc. v. Pena*, 63 U.S.L.W. 4523, 4531-32 (U.S. June 12, 1995) (overruling held to be warranted where decision had undermined "important principles" established in earlier cases); *United States v. Dixon*, 113 S. Ct. 2849, 2860 (1993) (overruling held to be warranted where decision "lack[ed] constitutional roots" and was "wholly inconsistent with earlier Supreme Court precedent"); *Swift & Co. v. Wickham*, 382 U.S. 111, 128-29 (1965) (overruling of decision held to be warranted to reaffirm pre-existing precedent).

III. THE FIRST AMENDMENT REQUIRES THE GOVERNMENT TO JUSTIFY A RESTRICTION ON COMMERCIAL SPEECH BY A PREPONDERANCE OF THE EVIDENCE, AND THE FACTS CLAIMED TO SUPPORT THE RESTRICTION MUST BE SUBJECT TO *DE NOVO* JUDICIAL REVIEW.

A. The Government Bears a Heavy Burden of Justification under the Third and Fourth Prongs of the *Central Hudson* Test.

Under the *Central Hudson* test, commercial speech that is not false, deceptive, or misleading may be restricted, but only if the State shows that the restriction "directly and materially advances a substantial state interest," and that the restriction advances that interest "in a manner no more extensive than necessary to serve that interest." *Ibanez, supra*, 114 S. Ct. at 2088; *Coors, supra*, 115 S. Ct. at 1589; *Florida Bar v. Went For It, supra*, slip op., at 5. Even if the purpose served by Rhode Island's alcohol beverage price advertising ban is viewed as "substantial," the State did not even begin to make the other showings required under the *Central Hudson* test.

The third and fourth prongs of the *Central Hudson* test are exacting.[8] The third prong ("directly advances") requires the government to prove that its restriction "will in fact" produce the desired result: A governmental body seeking to sustain a restriction on commercial speech

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[8] In *Florida Bar v. Went For It, supra*, the Court referred to the third and fourth prongs of the *Central Hudson* test as the second and third prongs. Slip op., at 5.

"'must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.'" *Ibanez, supra,* 114 S. Ct. at 2088 (quoting *Edenfield, supra,* 113 S. Ct. at 1800).

The fourth prong ("no more extensive than necessary") requires the government to demonstrate that the restriction is "sufficiently tailored to its goal." *Coors, supra,* 115 S. Ct. at 1592-93. A restriction on commercial speech is not "sufficiently tailored to its goal" if there exist other means by which the government could pursue its objectives "in a manner less intrusive to [the speaker's] First Amendment rights." *Coors, supra,* 115 S. Ct. at 1593. *See also City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1510 n.13 (1993).

The Court has stated time and again that the government bears the burden of justification. *Coors, supra,* 115 S. Ct. at 1592; *Ibanez, supra,* 114 S. Ct. at 2084; *Edenfield, supra,* 113 S. Ct. at 1800; *Bolger, supra,* 463 U. S. at 71 n.20. The Court has stressed that the government's burden under the third prong of the *Central Hudson* test "is not satisfied by mere speculation and conjecture." *Coors, supra,* 115 S. Ct. at 1592 (quoting *Edenfield, supra,* 113 S. Ct. at 1800)).

B. Rhode Island Failed To Carry Its Burden of Justification, and the Court Below Abdicated its Essential Reviewing Function.

Rhode Island failed to carry its burden of justification under the third and fourth prongs of the *Central Hudson* test. With regard to the third prong, it obviously cannot be said that Rhode Island "demonstrated" that its price advertising ban "will in fact" serve the State's asserted

"temperance" objective "directly and materially." To the contrary, the court below acknowledged that there was "no empirical evidence" as to the ability of Rhode Island's price advertising ban to accomplish its asserted purpose, and that the expert opinions on this point went "both ways." 39 F.3d at 7. With regard to the fourth prong, the court observed that the State's own witness had conceded the availability of alternatives to a price advertising ban that could achieve the State's asserted goal without curtailing speech. *Id.*

In the face of the State's perfect failure of proof, the court below was able to sustain Rhode Island's price advertising ban only by ratcheting down the applicable standard of review and by shifting the burden of persuasion to the petitioners.[9] The court held that Rhode Island's price advertising ban satisfied the third prong of the *Central Hudson* test because, in the court's view, the State's belief that the ban would accomplish its asserted objective made logical sense, and the petitioners had offered nothing by way of "affirmative contradiction" to refute that belief. 39 F.3d at 7-8. The court likewise held that the ban satisfied the fourth prong of the *Central Hudson* test on the ground that it was a "reasonable choice." *Id.* at 7.

The court's application of an erroneous standard of review is obvious. The court cited *Posadas* for the proposition that "warrantable inferences" might suffice to sustain Rhode Island's law under the third prong of the

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[9] In doing so, the court below relied on the "added presumption in favor of the validity of the state regulation" that it erroneously considered to be required by the Twenty-First Amendment. 39 F.3d at 7.

Central Hudson test. In *Posadas*, the Court indeed required comparatively little from the government by way of justification in upholding the challenged casino advertising ban. But subsequent decisions such as *Coors* and *Edenfield*, which emphasize the heavy burden of justification borne by the government when it attempts to restrict commercial speech, confirm that *Posadas* was anomalous in this respect, as it is in others. *See also Florida Bar v. Went For It, Inc.*, *supra*, slip op., at 1-2, 8-12 (sustaining a lawyer advertising restriction after "scouring" the extensive factual record developed by the State Bar, "which respondents at no time refuted"). In upholding Rhode Island's price advertising ban, the court below relied on nothing more than "speculation or conjecture." *Edenfield*, *supra*, 113 S. Ct. at 1800. That simply is not enough when speech is restricted on the basis of its content.[10]

The court below also relied on this Court's decision in *Trustees of the State University of New York v. Fox*, 492 U.S. 469 (1989), in concluding that Rhode Island had

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[10] Even the "warrantable inferences" on which the court below relied (39 F.3d at 7) are highly questionable. The State's belief that lower prices will result in increased consumption makes logical sense only if one assumes that people will consume as much alcohol as they can afford, or at least that current prices are preventing them from consuming as much alcohol as they would like. As an intuitive matter, however, it seems equally likely that people currently consume as much alcohol as they desire, and that if prices were reduced they would either spend the extra money on something else or "move up" to newly affordable higher-quality brands. Rhode Island's price advertising ban, of course, prevents them from doing either.

satisfied its burden under the fourth prong of the *Central Hudson* test. Even *Fox*, however, eschewed any test as "overly permissive" as the test applied by the court below, which imposed no burden on the State whatever to justify its choice as "narrowly tailored." *See* 492 U.S. at 480.

Moreover, despite this Court's insistence that the fourth prong of the *Central Hudson* test does not impose a least-restrictive-means requirement, the Court's decisions in such cases as *Discovery Network*, *supra*, and *Coors*, *supra*, have restored the fourth prong to something close to such a requirement. Specifically, the Court has stated that a restriction on commercial speech is not "sufficiently tailored to its goal" if there exist other means by which the government could pursue its objectives "in a manner less intrusive to [the speaker's] First Amendment rights." *Coors, supra,* 115 S. Ct. at 1593. Similarly, in *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1510 n.13 (1993), the Court stated that the existence of "obvious less-burdensome alternatives" is a "relevant consideration in determining whether the 'fit' between means and ends is reasonable."

In finding that the means chosen by Rhode Island to accomplish its asserted goals were "reasonable," the court held it to have been error for the District Court to engage in an independent weighing of the evidence to determine the "correctness" of the State's choices. 39 F. 3d at 7. In so doing, however, the court below not only misapplied the pertinent *Central Hudson* requirements but abdicated its own essential reviewing function in a First Amendment case.

The First Amendment's protections would be meaningless if courts were to defer to legislative

determinations that restrictions on speech are justified. Such deference is not and has never been the rule. To the contrary, as this Court has emphasized, "'[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake.'" *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 129 (1989) (citation omitted). With respect to factual findings that are "relevant to resolving a constitutional issue," the Court has stated that "whatever deference is due legislative findings [cannot] foreclose our independent judgment of the facts bearing on an issue of constitutional law." *Id.*

It is the judiciary's task in the end "to decide whether [the legislature] has violated the Constitution." *Id.* Courts "are obliged to make a fresh examination of crucial facts" in First Amendment cases, to protect against any "forbidden intrusion on the field of free expression." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, No. 94-749, slip op., at 9-10 (June 19, 1995) (citations and quotations omitted). *De novo* judicial review of "crucial facts" must be required whenever speech is targeted on the basis of its content, because "the reaches of the First Amendment are ultimately defined by the facts that it is held to embrace." *Id.* at 9.[11]

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[11] *See also Turner Broadcasting System, Inc. v. FCC*, 114 S. Ct. 2445 (1994). In *Turner*, the Court considered a First Amendment challenge to provisions of the Cable Television Consumer Protection and Competition Act of 1992. Finding that there were factual issues to be decided in the case regarding whether the challenged rules "will in fact advance" the government's asserted interests, the Supreme Court reversed the lower court's grant of summary judgment in the case. The Court stated:

(continued...)

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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[11] (...continued)

> [B]ecause there are genuine issues of material fact [in this regard] still to be resolved on this record, we hold that the District Court erred in granting summary judgment in favor of the Government. Because of the unresolved factual questions, the importance of the issues * * *, and the conflicting conclusions that the parties contend are to be drawn from the statistics and other evidence presented, we think it necessary * * * to allow the District Court to resolve any factual disputes remaining, before passing upon the constitutional validity of the challenged provisions.

Id. at 2472 (citations omitted).

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In The

Supreme Court of the United States

October Term, 1994

44 LIQUORMART, INC. and PEOPLES SUPER LIQUOR STORES, INC.,

Petitioners,

vs.

STATE OF RHODE ISLAND, and RHODE ISLAND LIQUOR STORES ASSOCIATION,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF THE MALT BEVERAGE DISTRIBUTORS ASSOCIATION OF PENNSYLVANIA AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

	Page
Statement of the Case	1
Summary of Argument	1
Argument	2
The Twenty-first Amendment should be considered in a commercial speech case involving the regulation of alcoholic beverages.	2
Conclusion	6

TABLE OF CITATIONS

Cases Cited:

Bierman v. Pennsylvania Liquor Control Board, 145 A.2d 876, 188 Pa. Super. 200 (1958)	1
California v. LaRue, 409 U.S. 109 (1972)	3,5
Central Hudson Gas v. Public Service Commission, 447 U.S. 557 (1980)	2,3,4
Commonwealth Liquor Control Board v. Starr, 318 A.2d 763, 13 Pa. Comm. 415 (1974), *aff'd,* 337 A.2d 914, 462 Pa. 124	1
44 Liquormart, Inc. v. State of Rhode Island, 39 F.3d 5 (1st Cir. 1994)	3

Contents

	Page
New York State Liquor Authority v. Bellanca, 452 U.S. 714 (1981)	3,5
Rubin v. Coors Brewing Co., 115 S. Ct. 1585 (1995)	4,5
Tony Savatt, Inc. v. Latrobe Brewing Company, 583 A.2d 796, 400 Pa. Super. 296 (1990), *appeal denied*, 593 A.2d 843, 527 Pa. 668, *cert. denied*, 112 S. Ct. 586, 116 L. Ed. 2d 611	1
Statutes Cited:	
Section 4-498 of the Pennsylvania Liquor Code	1
47 P.S. § 101 *et seq.*	1
47 P.S. § 104	1
Rhode Island Gen. Laws. § 3-8-7	1,2
Rhode Island Gen. Laws. § 3-8-8.1	2
27 U.S. C. § 201 *et seq.*	4
United States Constitution Cited:	
Twenty-first Amendment	2,5
First Amendment	2,5
Fourteenth Amendment	2

STATEMENT OF THE CASE

The Statement of the Case as set forth in Respondents' brief is agreed with.

SUMMARY OF ARGUMENT

The Malt Beverage Distributors Association of Pennsylvania is a state-wide organization representing the interests of both wholesale and retail distributors of malt and brewed beverages. Pennsylvania directly controls all transactions in distilled spirits (liquor) and wines, and has an extensive and comprehensive regulatory scheme to control transactions in malt and brewed beverages through its licensing system of both Importing Distributors and Distributors.

The Pennsylvania Liquor Code is set forth at 47 P.S. § 101, *et seq.*, and governs all trafficking in alcoholic beverages "for the protection of the *public* welfare, health, peace and morals of the people of the Commonwealth . . ." (emphasis added) 47 P.S. § 104. The Pennsylvania courts have construed their purpose to be restraining rather than promoting the sale of liquor, *Bierman v. Pennsylvania Liquor Control Board*, 145 A.2d 876, 188 Pa. Super. 200 (1958) and to protect public health, welfare, peace and morals. *Commonwealth Liquor Control Board v. Starr*, 318 A.2d 763, 13 Pa. Comm. 415 (1974), *aff'd*, 337 A.2d 914, 462 Pa. 124; *Tony Savatt, Inc. v. Latrobe Brewing Company*, 583 A.2d 796, 400 Pa. Super. 296 (1990), *appeal denied*, 593 A.2d 843, 527 Pa. 668, *cert. denied*, 112 S. Ct. 586, 116 L. Ed. 2d 611.

Section 4-498 of the Pennsylvania Liquor Code is identical to Rhode Island Gen. Laws § 3-8-7 which forbids off-premises price advertising of alcoholic beverages. Banning off-premises price advertising protects the public health of the citizens of the Commonwealth in that, as Rhode Island argues, competitive

price advertising tends to lower prices which results in increased consumption and the attendant ills of same. These are public policy decisions made by the legislatures of Rhode Island and Pennsylvania. Because of the powers granted to the states pursuant to the Twenty-first Amendment these restrictions should be upheld by this Court so long as they are found to be reasonable or rational when balanced against conflicting constitutional rights.

In all other respects the Summary of Argument set forth in Respondents' brief is agreed with.

ARGUMENT

THE TWENTY-FIRST AMENDMENT SHOULD BE CONSIDERED IN A COMMERCIAL SPEECH CASE INVOLVING THE REGULATION OF ALCOHOLIC BEVERAGES.

Rhode Island Gen. Laws § 3-8-7 and 3-8-8.1 are restrictions upon commercial speech. Commercial speech is ". . . expression related solely to the economic interests of the speaker and its audience (citations omitted) . . ." and under the First and Fourteenth Amendments is protected from ". . . unwarranted governmental regulation." *Central Hudson Gas v. Public Service Commission*, 447 U.S. 557 (1980). It may be restricted if it meets the test set forth in *Central Hudson, supra*, namely:

> At the outset, we must determine whether the expression is protected by the First Amendment. [I] For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. [II] Next, we ask whether the asserted governmental interest is substantial.

> If both inquiries yield positive answers, we must determine [III] whether the regulation directly advances the governmental interest asserted, and [IV] whether it is not more extensive than is necessary to serve that interest.

Central Hudson, supra, as cited in *44 Liquormart, Inc. v. State of Rhode Island,* 39 F.3d 5 (1st Cir. 1994). Satisfaction of Parts I and II are not at issue in this case; Parts III and IV are.

The Circuit Court recognized that the state has the burden of proving that the restriction "directly advances" temperance, and "is not more extensive than is necessary." *44 Liquormart, Inc., supra* at page 7; and that the standard or test of the burden of proof is one of reasonableness. This Court applied a reasonableness standard in *California v. LaRue,* 409 U.S. 109, 115, 116 (1972):

> Based on the evidence from the hearings that it cited to the District Court, and mindful of the principle that in legislative rule-making the agency may reason from the particular to the general, *Assigned Car Cases,* 274 U.S. 564, 583, 71 L. Ed. 1204, 47 S. Ct. 727 (1927), *we do not think it can be said that the Department's conclusion in this respect* [that lewd or naked dancing should not be permitted on licensed premises] *was an irrational one.* (emphasis added)

And again, in *New York State Liquor Authority v. Bellanca,* 452 U.S. 714, 718 (1981):

> In sort, the elected representatives of the State of New York have chosen to avoid the

> disturbances associated with mixing alcohol and nude dancing by means of a *reasonable* restriction upon establishments which sell liquor for on-premises consumption ... Although some may quarrel with the wisdom of such legislation and may consider topless dancing a harmless diversion, *the Twenty-first Amendment makes that a policy judgment for the state legislature, not the courts.* (emphasis added)

In the case at bar the Circuit Court meticulously reviewed the testimony compiled in the District Court and found "... in the absence of any affirmative contradiction to rely on ..." that the District Court was not free to hold the Rhode Island statute to be an unconstitutional infringement upon commercial speech. Rhode Island had reasonably proven that its statute satisfied Parts III and IV of the *Central Hudson* test.

In the recent case of *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585 (1995) this Court applied a similar analysis. The federal statute challenged, Federal Alcohol Administration Act, 49 Stat. 977, 27 U.S.C. § 201 *et seq.*, prohibited disclosure of the alcohol content of beer on labels or in advertising. In the opinion the *Central Hudson* test was applied and again the federal restriction was carefully scrutinized to determine if it met Parts III and IV of that test. It did not because this Court found that the restriction *as applied to beer labels* made no *rational* sense if the true aim of the restriction was to suppress strength wars. *Coors, supra,* at 1592, 1593 (emphasis added). In addition both the District Court, Court of Appeals and this Court found that the government had produced *no credible evidence* supporting its contention that disclosure of alcohol content would promote strength wars. *Coors, supra,* at 1593 (emphasis added). This is not the same factual situation now presented to this Court. Here, the Circuit

Court found the evidence to be equivocal, supporting both Rhode Island's contention that price advertising restrictions promote temperance by lowering the consumption of alcohol and 44 Liquormart's contention that they do not. In this context the Circuit Court upheld the constitutionality of the statute.

It is interesting to note that *Coors, supra,* dealt only with the irrationality of the federal regulation as applied to beer *labels.* This Court did not reach the issue of whether prohibition of disclosure of alcohol content in *advertising* would be rational and permissible. It did not reach this issue because the District Court upheld the ban on disclosure in advertising and Coors chose not to appeal that decision. Viewed in that light, it is not unreasonable to infer that Coors itself saw the form or vehicle of advertising determining the reasonableness of the government's restriction. Consequently, this Court should limit its holding in *Coors, supra,* to the particular facts of that case and not extend it to strike down the Rhode Island statute in question.

The purpose of the Twenty-first Amendment was to return control over transactions in alcoholic beverages to the states. To fulfill that guarantee of rights granted to the states when in conflict with First Amendment rights, be they freedom of expression, *LaRue* and *Bellanca, supra,* or commercial speech, *Coors, supra,* if the state restriction is reasonable or rational in promoting the state scheme of control over alcoholic beverages it should be upheld.

In all other respects the Argument as set forth in Respondents' brief is agreed with.

CONCLUSION

The Conclusion as set forth in Respondents' brief is agreed with.

Respectfully submitted,

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OCTOBER TERM, 1995

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QUESTION PRESENTED

Whether Rhode Island may, consistent with the First Amendment, prohibit truthful, non-misleading price advertising regarding alcoholic beverages.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF THE *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	3
ARGUMENT	6
I. RHODE ISLAND'S LIMITATION ON ALCOHOL PRICE ADVERTISING SATISFIES *CENTRAL HUDSON*	6
A. The Price Advertising Restriction "Directly And Materially" Advances Rhode Island's Interest In Temperance	7
B. Rhode Island's Restriction Is "Narrowly Drawn"	16
II. AN ADVERTISING RESTRICTION IS A CONSTITUTIONALLY PERMISSIBLE MEANS OF REGULATING A SOCIALLY HARMFUL PRODUCT OR ACTIVITY OVER WHICH THE STATE HAS EXTRAORDINARY CONTROL AND WHICH IT COULD BAN COMPLETELY	19
A. Alcohol Is A Unique Product Over Which States Historically Have Had Extraordinary Control	19
B. The Court Has Consistently Upheld Advertising Regulations Where Harmful Products Or Activities Are Involved	23
CONCLUSION	27

TABLE OF AUTHORITIES

Cases	Page
324 Liquor Corp. v. Duffy, 479 U.S. 335 (1987)	8, 20
Bigelow v. Virginia, 421 U.S. 809 (1975)	21
Board of Trustees of State Univ. of N.Y. v. Fox, 492 U.S. 469 (1989)	6, 9, 17, 18
Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984)	13
Central California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980)	20
Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557 (1980)	*passim*
Clark Distilling Co. v. Western Maryland Ry. Co., 242 U.S. 311 (1917)	21
Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973)	11
Crane v. Campbell, 245 U.S. 304 (1917)	20-21
Dunagin v. City of Oxford, 718 F.2d 738 (5th Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984)	16
Edenfield v. Fane, 113 S.Ct. 1792 (1993)	*passim*
Florida Bar v. Went For It, Inc., 115 S.Ct. 2371 (1995)	*passim*
Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981)	9-10, 11
New York Liquor Authority v. Bellanca, 452 U.S. 714 (1981)	24
North Dakota v. United States, 495 U.S. 423 (1990)	19-20
Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978)	6
Oklahoma Telecasters Ass'n v. Crisp, 699 F.2d 490 (10th Cir. 1983), *rev'd*, 467 U.S. 691 (1984)	16
Pittsburgh Press Co. v. Human Relations Comm'n 413 U.S. 376 (1973)	6
Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico, 478 U.S. 328 (1986)	*passim*
Queensgate Inv. Co. v. Liquor Control Comm'n, 433 N.E.2d 138 (Ohio), *appeal dismissed*, 459 U.S. 807 (1982)	2-3, 15-16
Rhode Island Liquor Stores Ass'n v. The Evening Call Publishing Co., 497 A.2d 331 (R.I. 1985)	8

TABLE OF AUTHORITIES—Continued

	Page
Rice v. Rehner, 463 U.S. 713 (1983)	20
Rubin v. Coors Brewing Co., 115 S.Ct. 1585 (1995)	14
S & S Liquor Mart, Inc. v. Pastore, 497 A.2d 729 (R.I. 1985)	8
Seaboard Air Line Ry. v. State of North Carolina, 245 U.S. 298 (1917)	24
Turner Broadcasting System v. FCC, 114 S.Ct. 2445 (1994)	10, 11, 13
United States v. Edge Broadcasting Co., 113 S.Ct. 2696 (1993)	*passim*
Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976)	6, 12
Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305 (1985)	26
Wisconsin v. Constantineau, 400 U.S. 433 (1971)	20
Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985)	14
Ziffrin, Inc. v. Reeves, 308 U.S. 132 (1939)	2, 22

Statutes

15 U.S.C. § 1335	25
27 U.S.C. § 215	25
Ohio Rev. Code Ann. § 4301.03(E)	25
Ohio Rev. Code Ann. § 4301.211	25
R.I. Gen. Laws § 3-1-5	3, 8

Other Authorities

William Baumol, "The Empirical Determination of Demand Relationships," in *Microeconomics: Selected Readings* (Edwin Mansfield, ed., 3d ed. 1979)	12
The Joint Committee of the States to Study Alcoholic Beverage Laws, *Alcoholic Beverage Control* (1960)	22, 23
Note, *Economic Localism in State Alcoholic Beverage Laws—Experience Under the Twenty-First Amendment*, 72 Harv. L. Rev. 1145 (1959)	22-23, 23

TABLE OF AUTHORITIES—Continued

Page

Dorothy P. Rice, *The Economic Cost of Alcohol Abuse and Alcohol Dependence: 1990*, 17 Alcohol Health & Research World 10 (1993) 19

U.S. Department of Health and Human Services, *Eighth Special Report to the U.S. Congress on Alcohol and Health* (1993) 19

U.S. Department of Justice, Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics - 1993* (1994) 3, 19

IN THE

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OCTOBER TERM, 1995

No. 94-1140

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INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling in-

terest in legal issues that affect state and local governments. State and local governments have always been vitally concerned with protecting the health and well-being of their citizens and possess broad police powers to legislate towards those ends. Specifically, States have historically had extremely broad power to regulate alcohol—a substance of tremendous destructive potential.

This Court, in applying the four-part test for regulation of commercial speech set forth in *Central Hudson Gas & Elec. Co. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980), has consistently recognized that reasonable minds may differ as to the best approach to complex societal problems. *See, e.g., United States v. Edge Broadcasting Co.*, 113 S. Ct. 2696, 2704 (1993). Accordingly, a legislature need not show that a regulatory measure touching on commercial speech is a perfect or uncontroversial solution —a showing that is frequently impossible. Petitioners urge a reading of *Central Hudson* which ignores this reality, insisting instead that a legislature attain absolute certainty and produce uncontroverted empirical proof before proceeding with any restriction on commercial speech. Such an approach, which is at odds with this Court's holdings, would severely constrain States in their efforts to address important social problems.

The dangers associated with constricting States' legislative powers through an erroneously narrow application of the *Central Hudson* test are magnified in this case, since the regulation at issue involves an extraordinarily dangerous product—alcohol. *See Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138-39 (1939); *Queensgate Inv. Co. v. Liquor Control Comm'n*, 433 N.E.2d 138, 141-42 (Ohio), *appeal dismissed*, 459

U.S. 807 (1982). The devastating, often deadly, effects of alcohol abuse are well known. *See, e.g.*, U.S. Department of Justice, Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics—1993* 349 (Table 3.104) (1994) (of 39,235 motor vehicle fatalities in 1992, approximately 45% were alcohol-related). Rhode Island, like other States, has sought to alleviate the severe problems resulting from alcohol abuse by regulating liquor advertising. *See* Br. of Resp. Rhode Island at 9 n.5.

Because of the importance of these issues to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of this case.[1]

SUMMARY OF ARGUMENT

1. Because the Rhode Island alcohol price advertising restriction at issue in this case limits pure commercial speech, its validity turns on the application of the four-part test set forth in *Central Hudson Gas & Elec. Co. v. Public Serv. Comm'n of New York*, 447 U.S. 557 (1980). The parties have stipulated that the statute limits speech which is not misleading and which does not involve illegal activity, and that Rhode Island's stated interest—"the promotion of temperance," R.I Gen. Laws § 3-1-5—is "substantial." Thus, only the last two prongs of *Central Hudson*'s test are at issue: whether the regulation "directly and materially" advances Rhode Island's interest in promoting temperance; and whether the regulation is "narrowly tailored" to achieve that objective. The statute clearly satisfies these two prongs, as they have been interpreted by this Court.

---

[1] The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court.

Petitioners' contention that Rhode Island's alcohol price advertising restriction does not "directly advance" the goal of temperance is premised on a reading of that requirement that cannot be squared with the Court's opinions. Recognizing that the complicated, intractable problems which legislatures regularly face are rarely susceptible of easy or uncontroversial solutions, this Court has not required a legislature to demonstrate that a particular measure is guaranteed to work perfectly or that it is unanimously endorsed by experts in the field. Instead, the Court has required that the legislature have some evidentiary basis beyond "mere speculation and conjecture," *Edenfield v. Fane*, 113 S.Ct. 1792, 1800 (1993), upon which it could base a reasonable belief in the efficacy of the regulation. *See, e.g., Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 341-42 (1986); *United States v. Edge Broadcasting Co.*, 113 S.Ct. 2696, 2704 (1993).

Without question, the Rhode Island legislature has met this burden. The Court has consistently viewed as reasonable a legislature's belief that restricting advertising of a commodity will decrease consumption of that commodity. *See, e.g., Posadas*, 478 U.S. at 341-42; *Edge*, 113 S.Ct. at 2704. The evidence presented by Rhode Island provided an ample basis for making a similar "commonsense judgment" here. *See Edge*, 113 S.Ct. at 2704.

Petitioners' contentions with respect to *Central Hudson*'s requirement that the regulation be "narrowly tailored" suffer from a similar defect. A legislature need not consider every imaginable alternative or prove that the one it selected is the least restrictive of speech. Instead, a regulation need only

be "reasonably well-tailored to its stated objective." *Florida Bar v. Went For It, Inc.*, 115 S.Ct. 2371, 2380 (1995). The Rhode Island statute, which is targeted at a single element within alcohol advertising, easily meets this requirement.

2. An advertising restriction is a constitutionally permissible means of addressing overconsumption of a socially harmful commodity which the State has the power to prohibit entirely. Without question, States enjoy extraordinary regulatory power over alcohol. Indeed, States' broad police powers with respect to alcohol predate the Twenty-first Amendment and exist independent of the powers granted therein. Because alcohol is a potentially harmful commodity which the State could ban entirely, the State may choose instead to limit efforts to stimulate demand for it.

Nor does the inapt charge of "paternalism" call the legitimacy of such a measure into question. There is nothing "paternalistic" about a State's efforts to prevent citizens from engaging in conduct, such as alcohol abuse, which directly harms others and imposes immense costs on society. It is a fundamental function of government that when individuals make socially harmful decisions, the government may use means at its disposal to alter those decisions—including, in appropriate cases, restrictions on commercial speech.

ARGUMENT

I. RHODE ISLAND'S LIMITATION ON ALCOHOL PRICE ADVERTISING SATISFIES *CENTRAL HUDSON*

At issue in this case are limitations placed on petitioners' ability to engage in price advertising of alcohol, a form of pure commercial speech "which does 'no more than propose a commercial transaction.' " *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 762 (1976) (quoting *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 385 (1973)). As the Court reaffirmed this past Term, such " '[c]ommercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values,' and is subject to 'modes of regulation that might be impossible in the realm of noncommercial expression.' " *Florida Bar v. Went For It, Inc.*, 115 S.Ct. 2371, 2375 (1995) (quoting *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 477 (1989), quoting *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978)); *see also Edge*, 113 S.Ct. at 2703. Accordingly, the alcohol price advertising restriction at issue here is subject to " 'intermediate' scrutiny . . . under the framework set forth in *Central Hudson*." *Went For It*, 115 S.Ct. at 2375-76 (citation omitted).

With respect to *Central Hudson*'s threshold inquiry, the parties agree that the price advertising at issue is not misleading and does not concern unlawful activity. Pet. App. 43a; *see Central Hudson*, 447 U.S. at 563-64. The Court in *Went For It* restated the remaining portions of the *Central Hudson* test as follows:

> Commercial speech that falls into neither of those categories [speech that concerns unlawful activity or is misleading], may be regulated if the government satisfies a test consisting of three related prongs: first, the government must assert a substantial interest in support of its regulation; second, the government must demonstrate that the restriction on commercial speech directly and materially advances that interest; and third, the regulation must be " 'narrowly drawn.' "

115 S.Ct. at 2376 (quoting *Central Hudson*, 447 U.S. at 564-65).

The parties have further stipulated that Rhode Island's interest in combatting alcohol abuse and promoting temperance is "substantial" under *Central Hudson*. Pet. App. 43. Thus, the constitutionality of Rhode Island's alcohol price advertising restriction turns on the final two prongs of *Central Hudson*: the restriction must "directly and materially advance[]" the State's interest, and the restriction must be "narrowly drawn." As *amici* demonstrate below, Rhode Island's statute satisfies both of these requirements.

A. The Price Advertising Restriction "Directly and Materially" Advances Rhode Island's Interest in Temperance

The starting point for assessing whether the State's interest is directly and materially advanced by the regulation is to "identify with care the interests the State itself asserts," because "[u]nlike rational basis review, the *Central Hudson* standard does not permit [a court] to supplant the precise interests put forward by the State with other sup-

positions." *Edenfield v. Fane*, 113 S.Ct. 1792, 1798 (1993). The interest asserted by Rhode Island in support of the legislation is straightforward: "the promotion of temperance." R.I. Gen. Laws § 3-1-5. Thus, the question under this prong of *Central Hudson* is whether this asserted interest—the promotion of temperance—is directly and materially advanced by the legislation at issue.[2]

---

[2] Petitioners and their *amici* have sought to introduce an additional element into this inquiry by suggesting that Rhode Island's asserted interest in temperance was not the true motive for the legislation. Pet. Br. 21; Br. *Am. Cur.* Ass'n of Nat'l Advertisers *et al.* 20-21. This is a red herring. This Court's opinions make clear that speculation as to possible unstated motives for legislation has no place in the *Central Hudson* analysis. *See Edenfield*, 113 S.Ct. at 1798. As the Court explained in *Edenfield*, the requirement that the legislation directly advance the *asserted* interest provides the necessary check against subterfuge and pretext: "Without this requirement, a State could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression." 113 S.Ct. at 1800. *Central Hudson* does not call upon courts to conduct independent investigations into the hearts and minds of individual legislators to divine possible hidden motivations. It simply requires that the asserted interest be directly advanced by the legislation.

Moreover, the Rhode Island Supreme Court, which has upheld the validity of the challenged statute, did not make any finding that would support the existence of an ulterior motive. *See Rhode Island Liquor Stores Ass'n v. The Evening Call Publishing Co.*, 497 A.2d 331 (R.I. 1985); *S & S Liquor Mart, Inc. v. Pastore*, 497 A.2d 729 (R.I. 1985); *see also 324 Liquor Corp. v. Duffy*, 479 U.S. 335, 351 (1987) ("We . . . accord 'great weight to the views of the State's highest court' on state-law matters, and customarily accept the factual findings of state courts in the absence of exceptional circumstances.") (citations omitted).

A number of recent decisions have fleshed out the meaning of this requirement. Petitioners' contentions to the contrary, the test plainly does not require that a State produce uncontroverted, conclusive empirical evidence that its asserted interest will be directly and materially advanced. While the test "is not satisfied by mere speculation or conjecture," *Edenfield*, 113 S.Ct. at 1800, neither does it require production of evidence of a quality and quantity that might be necessary to convince a trier of fact of the truth of a particular matter. It requires only a basis sufficient to support a reasonable belief on the part of the legislature as to the measure's efficacy. In *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986), for example, the Court upheld a restriction on the advertising of casino gambling, explaining that

> [t]he Puerto Rico Legislature obviously believed, when it enacted the advertising restrictions at issue here, that advertising of casino gambling aimed at the residents of Puerto Rico would serve to increase the demand for the product advertised. We think the legislature's belief is a reasonable one[.]

Id. at 341-42. *See also Fox*, 492 U.S. at 480 (*Central Hudson* requires "a fit [between legislative means and ends] that is not necessarily perfect, but reasonable.").

Far from imposing a requirement that exhaustive empirical data be presented to support a restriction on commercial speech, the Court has deferred to a legislature's "commonsense judgment" as to a measure's likely effects. *Edge*, 113 S.Ct. at 2704; *see also Metromedia, Inc. v. City of San Diego*, 453 U.S.

490, 509 (1981) (plurality opinion). While "the deference afforded to legislative findings does 'not foreclose our independent judgment of the facts bearing on an issue of constitutional law,'" *Turner Broadcasting System v. FCC*, 114 S.Ct. 2445, 2471 (1994) (plurality opinion) (citations omitted), "[t]his obligation to exercise independent judgment when First Amendment rights are implicated is not a license to reweigh the evidence *de novo*, or to replace [the legislature's] factual predictions with our own. Rather, it is to assure that, in formulating its judgments, [the legislature] has drawn reasonable inferences based on substantial evidence." *Id.* (plurality opinion); *see also id.* at 2473 n.1 (Stevens, J., concurring).

There are compelling practical reasons for this approach. Courts are much less suited than legislatures to sort through the available evidence and make precise predictions in areas where predictions of any kind are difficult. In *Turner*, Justice Kennedy explained as follows the need for deference to the legislature:

> [C]ourts must accord substantial deference to the predictive judgments of Congress. . . . Sound policymaking often requires legislators to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable. As an institution, Congress is far better equipped than the judiciary to "amass and evaluate the vast amounts of data" bearing upon an issue as complex and dynamic as that presented here.

Id. at 2471 (plurality opinion) (internal citations omitted); *see also id.* at 2472 (Blackmun, J., con-

curring) (emphasizing "the paramount importance of according substantial deference to the predictive judgments of Congress"); *id.* at 2473 & n.1 (Stevens, J., concurring).

Thus, "[t]he judgment of the Legislative Branch cannot be ignored or undervalued simply because [appellant] casts its claims under the umbrella of the First Amendment." *Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 103 (1973), *cited in Turner*, 114 S.Ct. at 2471 (plurality opinion); *see also Metromedia*, 453 U.S. at 509 (plurality opinion) ("[w]e . . . hesitate to disagree with the accumulated, common-sense judgments of local lawmakers and of the many reviewing courts" given that "[t]here is nothing here to suggest that these judgments are unreasonable").

The considerations which require judicial deference to legislative bodies are plainly involved here. Economic predictions are notoriously difficult to make, as Justice Stevens noted in his concurrence in *Turner*:

> Economic measures are always subject to second-guessing; they rest on inevitably provisional and uncertain forecasts about the future effect of legal rules in complex conditions. Whether Congress might have accomplished its goals more efficiently through other means; whether it correctly interpreted emerging trends in the protean communications industry; and indeed whether must-carry is actually imprudent as a matter of policy will remain matters of debate long after the 1992 Act has been repealed or replaced by successor legislation.

114 S.Ct. at 2473 (Stevens, J., concurring) (footnote omitted).

The uncertainty attending economic predictions is especially acute when economists attempt to determine the effect of adding or deleting one particular item of information, such as price, from the mix of information otherwise available to consumers. In *Virginia Pharmacy Board*, 425 U.S. at 765 n.20, the Court recognized that "[t]he task of predicting the effect that a free flow of drug price information would have on the production and consumption of drugs is a hazardous and speculative one." Such determinations are highly problematic because they require insight into consumer demand in hypothetical situations. *See generally* William Baumol, "The Empirical Determination of Demand Relationships," in *Microeconomics: Selected Readings* 55 (Edwin Mansfield, ed., 3d ed. 1979) (discussing difficulty of evaluating impact of factors such as advertising on consumer demand).

The lack of certainty attending economic predictions as to consumer behavior in the present case was emphasized by both the court of appeals and the district court. *See* Pet. App. 6 (opinion of court of appeals) (noting that expert opinion is divided on effects of price advertising, and that " 'advertising has cumulative effects that are difficult to detect in studies, and that research studies have been varied and equivocal because it is a difficult topic to research' ") (quoting plaintiffs' expert); Pet. App. 22 (opinion of district court) ("not[ing] a pronounced lack of unanimity among researchers who have studied the effects of alcohol advertising. No less than twelve different conclusions have been reached regarding the impact of advertising on the general consumption of alcoholic beverages.") (citing Tr. 3/11/93 at 50-51).

Such a lack of consensus does not, however, consign the legislature to paralysis. Any difficult and complicated social issue will engender differing views and will inevitably be the subject of contradictory and inconclusive expert opinions and studies. The existence of countervailing evidence does not in itself impugn the reasonableness of a legislature's judgment about the link between advertising and consumption. In *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 715 (1984), for example, the Court observed that "[a]lthough the District Court found that 'consumption of alcoholic beverages in Oklahoma has increased substantially in the last 20 years despite the ban on advertising of such beverages,' we may nevertheless accept Oklahoma's judgment that restrictions on liquor advertising represent at least a reasonable, albeit limited, means of furthering the goal of promoting temperance in the State." (citation omitted).

Nor should a court wade through competing technical information to decide the truth of the matter for itself. Instead, a court is charged with the far more limited task of determining whether some evidence exists upon which a legislature could base a reasonable belief in the efficacy of its solution, whether that evidence is empirical, anecdotal, or derived from precepts of common sense. *See Posadas*, 478 U.S. at 341-42; *Edge*, 113 S.Ct. at 2704-2705; *see also Turner*, 114 S.Ct. at 2473 (Stevens, J., concurring) ("the question for us is merely whether *Congress* could fairly conclude that cable operators' monopoly position threatens the continued viability of broadcast television and that must-carry is an appropriate means of minimizing that risk").

Only in the absence of such evidence may a court strike down legislation under *Central Hudson*'s third prong. *See Went For It*, 115 S.Ct. at 2377 (noting that in *Edenfield* the Court rejected a limitation on speech only after finding *no* evidence of any kind (not even anecdotal) that would suggest a connection between the regulation and the cited interest; indeed, the only evidence presented tended to disprove the existence of such a connection) (citing *Edenfield*, 113 S.Ct. at 1800); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 648 (1985) ("nowhere does the State cite any evidence or authority of any kind").[3]

Here, there is an evidentiary basis sufficient to support a legislative belief that a limitation on price advertising would promote temperance. *See* Br. Resp. Rhode Island 21-28. Indeed, the Court has consistently viewed as reasonable a legislature's belief that decreasing advertising of a socially harmful commodity will decrease consumption of that commodity. For example, in *Posadas* the Court found reasonable the legislature's apparent belief that banning casino gambling advertising directed at residents would reduce gambling on their part. 478 U.S. at 341-42. Similarly, in *Central Hudson* the Court recognized that "[t]here is an immediate connection between advertising and demand for electricity." 447 U.S. at 569. *See also Edge*, 113 S.Ct. at 2704 (Court had "no doubt" that banning of ads by stations licensed by a State would support State's anti-gambling policy).

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[3] A legislative scheme that pursues internally inconsistent objectives will also be struck down. *See Rubin v. Coors Brewing Co.*, 115 S.Ct. 1585, 1592-93 (1995).

This Court has credited the presumed relationship between advertising and demand even where the limitation on advertising is incomplete, or where there is reason to believe that the effects of the measure will be diluted by information emanating from other sources. As the Court explained in *Edge*:

> Here, as in *Posadas de Puerto Rico*, the Government obviously legislated on the premise that the advertising of gambling serves to increase the demand for the advertised product. Congress clearly was entitled to determine that broadcast of promotional advertising of lotteries undermines North Carolina's policy against gambling, even if the North Carolina audience is not wholly unaware of the lottery's existence. Congress has, for example, altogether banned the broadcast advertising of cigarettes, even though it could hardly have believed that this regulation would keep the public wholly ignorant of the availability of cigarettes.

113 S.Ct. at 2707 (citations omitted). The Court in *Edge* went on to conclude:

> If there is an immediate connection between advertising and demand, and the federal regulation decreases advertising, it stands to reason that the policy of decreasing demand for gambling is correspondingly advanced. Accordingly, the Government may be said to advance its purpose by substantially reducing lottery advertising, even where it is not wholly eradicated.

Id.

Likewise, courts have upheld advertising regulations similar to Rhode Island's under *Central Hudson*; these decisions have, in turn, been cited with approval by this Court. For example, in *Queensgate*

Inv. Co. v. Liquor Control Comm'n, 433 N.E.2d 138, 142 (Ohio), *appeal dismissed*, 459 U.S. 807 (1982), the Ohio Supreme Court upheld a ban on alcohol price advertising, finding that "[t]he advertising of drink prices and price advantages would encourage and stimulate excessive consumption of alcoholic beverages; an advertising prohibition aids the interest in preventing that consumption." *See Dunagin v. City of Oxford*, 718 F.2d 738, 750 (5th Cir. 1983) (en banc) ("we hold that sufficient reason exists to believe that advertising and consumption are linked to justify the [liquor advertising] ban, whether or not 'concrete scientific evidence' exists to that effect"), *cert. denied*, 467 U.S. 1259 (1984); *Oklahoma Telecasters Ass'n v. Crisp*, 699 F.2d 490, 501 (10th Cir. 1983) ("prohibitions against the advertising of alcoholic beverages are reasonably related to reducing the sale and consumption of those beverages and their attendant problems"), *rev'd on other grounds*, 467 U.S. 691 (1984); *see also Edge*, 113 S.Ct. at 2707 (citing *Queensgate*); *Posadas*, 478 U.S. at 347 n.10 (citing *Queensgate*, *Dunagin*, and *Crisp*).

In sum, it is clear that the Rhode Island legislature had a sufficient foundation upon which it could base its reasonable belief that the alcohol price advertising ban would promote temperance. Accordingly, under this Court's precedents, the regulation satisfies the requirement that it "directly and materially advance" that interest.

F. Rhode Island's Restriction Is "Narrowly Drawn"

The fourth prong of the *Central Hudson* test, as originally formulated, required that a regulation be "no more extensive than necessary." 447 U.S. at

569-70. It is now well settled, however, that this does not equate to a "least restrictive means" analysis:

> What our decisions require is a " 'fit' between the legislature's ends and the means chosen to accomplish those ends,"—a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition, but one whose scope is "in proportion to the interest served," that employs not necessarily the least restrictive means but, as we have put it in the other contexts discussed above, a means narrowly tailored to achieve the desired objective. Within these bounds, we leave it to governmental decisionmakers to judge what manner of regulation may best be employed.

Fox, 492 U.S. at 480 (citations omitted). *See also Went For It*, 115 S.Ct. at 2380 (restriction on commercial speech must be "narrowly tailored," or "*reasonably* well-tailored to its stated objective") (emphasis added); *Edge*, 113 S.Ct. at 2705 (in analyzing fourth prong of *Central Hudson*, "our commercial speech cases require a fit between the restriction and the government interest that is not necessarily perfect, but reasonable").

In rejecting a least restrictive means analysis, the *Fox* Court emphasized the deference that courts must accord a legislature's choice of means. 492 U.S. at 480-81. For example, in *Posadas* the Court upheld a ban on casino gambling advertising directed at Puerto Rican residents without inquiring as to whether less restrictive means (such as "counter-speech") could have served the same purpose:

> We think it is up to the legislature to decide whether or not such a "counterspeech" policy

> would be as effective in reducing the demand for casino gambling as a restriction on advertising. The legislature could conclude, as it apparently did here, that residents of Puerto Rico are already aware of the risks of casino gambling, yet would nevertheless be induced by widespread advertising to engage in such potentially harmful conduct.

Posadas, 478 U.S. at 344. *See also Fox*, 492 U.S. at 479 ("it was 'up to the legislature to decide' that point, so long as its judgment was reasonable") (quoting *Posadas*, 478 U.S. at 344).

The Rhode Island legislature could reasonably have made the judgment that more direct methods of reducing the consumption of alcohol, such as fixing a minimum price or adding a tax, would not be as effective in achieving their goals. This conclusion is patently reasonable, especially given the fact that Rhode Island is a small state whose residents can readily cross the state line to avoid any such measures. Nor was Rhode Island required to exhaust other methods of combatting alcohol abuse, such as stepped-up attempts at educating consumers about the risks of alcohol. Instead, it was justified in choosing to restrict advertising, which is a well established method of combatting the consumption of socially harmful products. Rhode Island narrowly tailored its restriction to focus on the one aspect of advertising—the advertising of price advantages—which it found to be most directly linked to greater consumption. *Central Hudson*'s fourth prong does not require more.

II. AN ADVERTISING RESTRICTION IS A CONSTITUTIONALLY PERMISSIBLE MEANS OF REGULATING A SOCIALLY HARMFUL PRODUCT OR ACTIVITY OVER WHICH THE STATE HAS EXTRAORDINARY CONTROL AND WHICH IT COULD BAN COMPLETELY

A. Alcohol Is a Unique Product Over Which States Historically Have Had Extraordinary Control

Like gambling in *Posadas*, the sale of alcohol is a highly regulated activity which a State could ban entirely. The devastating effects of alcohol abuse are well known. Data for the year 1992 indicates that nearly half (45.1%) of all motor vehicle fatalities involved alcohol. *See* U.S. Department of Justice, Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics—1993* 349 (Table 3.104) (1994). Alcohol is also a factor in a large percentage of other accidental deaths, including falls, drownings, and burn-related fatalities, as well as a large proportion of homicides and suicides. *See* U.S. Department of Health and Human Services, *Eighth Special Report to the U.S. Congress on Alcohol and Health* 234, 237, 243, 246 (1993). In 1992, over 3 million arrests were made for alcohol-related offenses, *Sourcebook of Criminal Justice Statistics - 1993* at 456 (Table 4.32), and data for the year 1990 estimates the total cost of alcohol abuse and dependency at $98.6 billion. Dorothy P. Rice, *The Economic Cost of Alcohol Abuse and Alcohol Dependence: 1990*, 17 Alcohol Health & Research World 10 (1993).

Without question, States enjoy extraordinary regulatory power over commerce in alcohol. *See, e.g., North Dakota v. United States*, 495 U.S. 423, 433 (1990) (plurality opinion) ("Given the special protection afforded to state liquor control policies by the

Twenty-first Amendment, they are supported by a strong presumption of validity and should not be set aside lightly."); *id.* at 431 ("within the area of its jurisdiction, the State has 'virtually complete control' over the importation and sale of liquor and the structure of the liquor distribution system") (citing *Central California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980)); *see also 324 Liquor Corp. v. Duffy*, 479 U.S. 335, 356 (1987) (O'Connor, J., dissenting) ("The history of the Amendment strongly supports Justice Black's view that the Twenty-first Amendment was intended to return absolute control of the liquor trade to the States.").

While the Twenty-first Amendment is the most conspicuous manifestation of the States' broad powers over alcohol, "[t]he police power of the States over intoxicating liquors was extremely broad even prior to the Twenty-first Amendment." *Wisconsin v. Constantineau*, 400 U.S. 433, 436 (1971); *see also Rice v. Rehner*, 463 U.S. 713, 724 (1983) ("The State has an unquestionable interest in the liquor traffic that occurs within its borders, and that interest is independent of the authority conferred on the States by the Twenty-first Amendment."). For example, in *Crane v. Campbell*, 245 U.S. 304 (1917), the Court explained that

> It must now be regarded as settled that, on account of their well-known noxious qualities and the extraordinary evils shown by experience commonly to be consequent upon their use, a State has power absolutely to prohibit manufacture, gift, purchase, sale, or transportation of intoxicating liquors within its borders without violating the guarantees of the Fourteenth Amendment.

> As the State has the power above indicated to prohibit, it may adopt such measures as are reasonably appropriate or needful to render exercise of that power effective.

Id. at 307 (citations omitted); *see also Clark Distilling Co. v. Western Maryland Ry. Co.*, 242 U.S. 311, 320 (1917) ("That government can, consistently with the due process clause, forbid the manufacture and sale of liquor and regulate its traffic, is not open to controversy; and that there goes along with this power full police authority to make it effective, is also not open.").[4]

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[4] Because the State could ban alcohol entirely, petitioners' contention that Rhode Island's price advertising regulation violates the First Amendment under the doctrine articulated in *Bigelow v. Virginia*, 421 U.S. 809 (1975), *see* Pet. Br. 24-26, is without merit. Petitioners argue that *Bigelow* prohibits a State from regulating any commercial speech occurring within its borders which emanates from an out-of-state advertiser and relates to products or services legal in other States.

In *Posadas*, however, the Court indicated that the *Bigelow* doctrine was applicable only to speech concerning goods and services to which a constitutional right attaches—certainly not to "vices" which a State has the power to ban altogether. *See* 478 U.S. at 345-46. Any lingering doubts as to the applicability of *Bigelow* to commercial speech regarding "vices" legally taking place in other States was categorically laid to rest in *Edge*. There, the Court upheld a ban on broadcast advertising of lotteries within the borders of a non-lottery State, even though the advertising related to legal lotteries held in an adjoining State. *See Edge*, 113 S.Ct. at 2700-08. Although the majority did not expressly address the *Bigelow* doctrine, it upheld the advertising ban over the dissent's objection that *Bigelow* forbids "suppressing truthful, nonmisleading information regarding a legal activity in another State." *Edge*, 113 S.Ct. at 2709 (Stevens, J., dissenting). The *Edge* Court emphasized that, "[a]s in *Posadas*, the ac-

It is, of course, beyond dispute that this broad power to prohibit alcohol includes equally broad powers to regulate short of prohibition. The Court elaborated on this point in *Ziffrin, Inc. v. Reeves*:

> Without doubt a state may absolutely prohibit the manufacture of intoxicants, their transportation, sale, or possession, irrespective of when or where produced or obtained, or the use to which they are to be put. Further, she may adopt measures reasonably appropriate to effectuate these inhibitions and exercise full police authority in respect of them. . . . The state may protect her people against evil incident to intoxicants and may exercise large discretion as to means employed.

308 U.S. 132, 138-39 (1939) (citations omitted).

Throughout history, governments have sought to use such regulatory power over alcohol to combat its tragic effects:

> For centuries peoples of many countries have sought to prevent or eliminate the hazards that are privy to the unregulated manufacture, sale and distribution of alcoholic beverages. The pages of history contain considerable evidence that the public interest requires governmental regulation of the alcohol beverage business . . . .

The Joint Committee of the States to Study Alcoholic Beverage Laws, *Alcoholic Beverage Control* 4 (1960).[5]

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tivity underlying the relevant advertising—gambling—implicates no constitutionally protected right; rather, it falls into a category of 'vice' activity that could be, and frequently has been, banned altogether." *Id.* at 2703 (citation omitted).

[5] *See also* Note, *Economic Localism in State Alcoholic Beverage Laws—Experience Under the Twenty-First Amendment*, 72 Harv. L. Rev. 1145, 1148 (1959) ("Controls imposed

Specifically, there is a longstanding history of state regulation of alcohol advertising: "[A]lthough federal law establishes minimum labeling and advertising requirements, many states have additional requirements which are applicable to all liquor sold or advertised in the state." *Economic Localism*, 72 Harv. L. Rev. at 1149 (footnotes omitted).

B. The Court Has Consistently Upheld Advertising Regulations Where Harmful Products Or Activities Are Involved

In *Posadas*, the Court reaffirmed that a legislature may choose to combat consumption which it deems socially harmful through indirect measures such as restrictions on advertising of the harmful product or service:

> Appellant also makes the related argument that, having chosen to legalize casino gambling for residents of Puerto Rico, the legislature is prohibited by the First Amendment from using restrictions on advertising to accomplish its goal of reducing demand for such gambling. We disagree. In our view, appellant has the argument backwards. . . . [I]t is precisely *because* the government could have enacted a wholesale prohibition of the underlying conduct that it is permissible for the government to take the less intrusive step of allowing the conduct, but reducing the demand through restrictions on advertising.

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by every state upon various phases of the alcoholic-beverage industry, from manufacture to distribution and ultimate consumption, make it one of the most highly regulated of all business activities."); Joint Committee, *Alcohol Beverage Control* at 4 ("[T]he alcoholic beverage business is *sui generis*, and . . . it must be considered and treated differently than every other business.").

478 U.S. at 346; *see Edge*, 113 S.Ct. at 2703-05. Indeed, a contrary rule would be difficult to understand:

> It would . . . . surely be a strange constitutional doctrine which would concede to the legislature the authority to totally ban a product or activity, but deny to the legislature the authority to forbid the stimulation of demand for the product or activity through advertising on behalf of those who would profit from such increased demand. Legislative regulation of products or activities deemed harmful, such as cigarettes, alcoholic beverages, and prostitution, has varied from outright prohibition on the one hand, to legalization of the product or activity with restrictions on stimulation of its demand on the other hand. To rule out the latter, intermediate kind of response would require more than we find in the First Amendment.

Posadas, 478 U.S. at 346-47 (citations and footnote omitted).[6]

As the Court noted in *Posadas*, there are many examples of restrictions on advertising at both the federal and state level to reduce demand for socially harmful products. *See Posadas*, 478 U.S. at 347 & n.10 (citing a number of such advertising restric-

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[6] *Cf. New York State Liquor Auth. v. Bellanca*, 452 U.S. 714, 717 (1981) (per curiam) ("The State's power to ban the sale of alcoholic beverages entirely includes the lesser power to ban the sale of liquor on premises where topless dancing occurs."); *Seaboard Air Line Ry. v. State of North Carolina*, 245 U.S. 298, 304 (1917) ("The challenged act instead of interposing an absolute bar against all such shipments [of alcohol], as it was within the power of the State to do, in effect permitted them upon conditions . . . . The greater power includes the less.").

tions, including 15 U.S.C. § 1335, which bans cigarette advertising "on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission," and Ohio Rev. Code Ann. §§ 4301.03(E), 4301.211 (1982), which prohibit off-premises advertising of beer prices); *see also Edge*, 113 S.Ct. at 2700-01 (discussing history of federal regulation of lottery advertising). *See also* 27 U.S.C. § 215 (requiring alcohol warning labels). Likewise, in *Central Hudson* the majority assumed that an advertising restriction could be a permissible means to decrease demand for a commodity (energy), where overconsumption of that commodity during an energy crisis was socially harmful. *See* 447 U.S. at 573-74 (Blackmun, J., concurring).

Nor is the legitimacy of such measures called into question by resort to the inapt and highly pejorative label "paternalism." There is nothing paternalistic about a State's efforts to prevent citizens from engaging in conduct, such as alcohol abuse, which directly harms others. *See* p. 19, *supra*. The exercise of the police powers is always suffused with the notion that when decisions of individuals harm society, society can use means at its disposal to alter those decisions—including, in appropriate cases, restrictions on commercial speech. When private decisions influenced by such commercial speech are affirmatively harmful to others, it is inappropriate to insist that government sit back and wait for "the marketplace of ideas" to sort things out. As then-Justice Rehnquist explained in dissent in *Central Hudson*, "[t]here is no reason for believing that the marketplace of ideas is free from market imperfections any more than there is to believe that the invisible hand will always lead to optimum economic decisions in

the commercial market." 447 U.S. at 592 (Rehnquist, J., dissenting).

In any event, the charge of "paternalism" is not itself a legitimate basis for invalidating legislation. This point was emphasized by the Court in *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305 (1985):

> It is not for the District Court or any other federal court to invalidate a federal statute by so cavalierly dismissing a long-asserted congressional purpose. If "paternalism" is an insignificant Government interest, then Congress first went astray in 1792, when by its Act of March 23 of that year it prohibited the "sale, transfer or mortgage . . . of the pension . . . [of a] soldier . . . before the same shall become due." Acts of Congress long on the books, such as the Fair Labor Standards Act, might similarly be described as "paternalistic"; indeed, this Court once opined that "[s]tatutes of the nature of that under review, limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual. . . ." *Lochner v. New York*, 198 U.S. 45 (1905). That day is fortunately long gone, and with it the condemnation of rational paternalism as a legitimate legislative goal.

Id. at 323 (citations omitted).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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August 21, 1995